Supreme Court, U.S.
FILED
98 733 SEP 17 1998
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States
October Term 1998

Johnny Powell and Hugh Powell

Petitioners

vs.

Alabama Power Company

Respondents

On Petition for Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

William J. Trussell
Counsel of Record
Trussell & Funderburg, P.C.
1916 First Avenue, North
Pell City, Alabama 35125
(205) 338-7273
Attorney for Petitioners

10 9 PP

QUESTION PRESENTED

I. WHETHER ALABAMA POWER COMPANY (APCo), A PUBLIC UTILITY, IS LIABLE AS A FEDERAL ACTOR UNDER *BIVENS* WHEN IT HAS BEEN DELEGATED A DUTY THAT IS SOVEREIGN IN NATURE, FLOOD CONTROL, AND IT ARBITRARILY AND CAPRICIOUSLY ENFORCES RULES REGARDING THE FLOOD EASEMENT AGAINST PROPERTY OWNERS ALONG THE COOSA RIVER.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL GROUNDS 1

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING WRIT 6

ARGUMENT 8

I. APCo IS A FEDERAL ACTOR FOR THE PURPOSE OF A FIFTH AMENDMENT BIVENS CLAIM FOR DISCRIMINATION IN THE REGULATION AND ENFORCEMENT OF ITS FLOOD EASEMENTS ACQUIRED AS A CONSEQUENCE OF THE FEDERAL GOVERNMENT DELEGATING TO IT THE DUTY TO REGULATE AND CONTROL FLOODING ON THE COOSA RIVER AND LOGAN MARTIN

Page

RESERVOIR.....8

A. Since flood control of navigable waterways was traditionally a power exclusively reserved to the sovereign, APCo is performing a public function and, therefore, may be subject to liability under a Bivens claim.....11

1. A private actor conducting an activity traditionally reserved to the government may be liable under Bivens for a violation of the Fifth amendment.....11

2. In acquiring and maintaining flood easements on the Coosa River and Logan Martin Reservoir, APCo is exercising a traditional government function which, in the case at bar, was delegated to it by the federal government through the FPC.....16

B. State action is present because there is a sufficiently close nexus between APCo's authority to control floods through the maintenance of easements and the federal government 23

CONCLUSION.....27

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

American Technical Machinery Corp.
v. Masterpiece Enterprises, Inc.
235 F. Supp. 917 (M.D. Pa, 1964).....8

Barron v. Carson
410 F. Supp. 299 (N.D. Ill. 1970) 12

Bivens v. Six Unknown Agents of Narcotics
403 U.S. 388 (1971) ..5, 6, 8, 10, 11, 12, 16

Civil Rights Cases
109 U.S. 3 (1883) 9

Condosta v. Vermont Electric Cooperative, Inc.
400 F.Supp. 358 (D. Vt. 1975) 6, 26, 27

Evans v. Newton
382 U.S. 296 (1966) 5, 14

Flagg Bros., Inc. v. Brooks,
436 U.S. 149 (1978) 12

Gay Law Students Association v. Pacific
Telegraph and Telephone
595 P.2d 592 (Cal. 1979) 25

Green and R. R. Navigation Co. v.
Chesapeake O and S.W.R. Co.
10 S.W. 6 (Ky. Ct. App. 1888) 16

TABLE OF AUTHORITIES - Continued

Page

Hansen v. Salt Lake City
794 P.2d 838 (Utah 1990) 5, 21

Jackson v. Metropolitan Edison
419 U.S. 345 (1974)
.....6, 12, 15, 16, 23, 24, 25, 26

Lake Country Estates, Inc. v. Tahoe
Regional Planning Agency
440 U.S. 391 (1979) 10

Lugar v. Edmondson Oil Co.
457 U.S. 922 (1982) 9

Marsh v. Alabama
326 U.S. 501 (1946) 5, 13, 15

Moose Lodge No. 107 v. Irvis
407 U.S. 163 (1972) 9, 10, 23, 24

Morast v. Lance
807 F.2d 926 (11th Cir. 1987) 10, 23

Newton v. Southeast Alabama Gas District
708 F.Supp. 1254, (M.D. Ala. 1989) 12

Pennsylvania Water and Power Company v.
Federal Power Commission
123 F.2d 155 (D.C. Cir.1941) 5, 17

TABLE OF AUTHORITIES - Continued

Page

Perez v. Sugarman
499 F. 2d 761 (2nd Cir. N.Y., 1974).....12

Shell Oil Co. v. Board of Commissioners
of Lake Ponchartrain Levee District
336 So.2d 248 (La. Ct. App. 1976) ..5,12, 22

State of Oklahoma v. Guy Atkinson
313 U.S. 508 (1941) 5, 17

St. Marie & Son, Inc. v. Hartz
Mountain Corp.
414 F. Supp. 71 (D.C. Minn 1976).....8

United States v. Twin City Power Company
350 U.S. 222 (1956) 5, 17

United States v. Grand River Dam Authority
363 U.S. 229, (1960) 18

Voykto v. Ramada Inn of Atlantic City
445 F. Supp. 315 (D.C., N.J., 1978) 12

Ward v. Hudnell
366 F. 2d 247 (5th Cir. 1966) 8

Constitutional Provisions

5th Amendment 1

TABLE OF AUTHORITIES - Continued

Page

Constitutional Provisions

14th Amendment 1

Statutes

16 U.S.C. §797 18

28 U.S.C. 1257(a) 1

33 U.S.C. 701(a) 18

33 U.S.C. 701(c-1) 18

42 U.S.C. §7172 19

42 U.S.C. §1983 .....2, 3

OPINIONS BELOW

The Circuit Court of St. Clair County, Alabama, Southern Judicial Division, at Pell City, Alabama, entered an Amended Order on May 13, 1997, dismissing the Powells' Counterclaim and Amended Counterclaim with prejudice. (App. 1a) The Supreme Court of Alabama affirmed the order of the trial court without opinion. (App. 1b) On June 19, 1998, the Powells' Application for Rehearing was overruled without opinion. (App. 1c).

STATEMENT OF JURISDICTION

This appeal is premised upon the jurisdiction of this Court as stated in 28 U.S.C. §1257(a). The order from the Supreme Court of Alabama, filed herewith as Appendix B, was rendered on April 17, 1998. Petitioners' Application for Rehearing was overruled on June 19, 1998, as found in Appendix C.

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES

Applicable Constitutional Provisions:

5th Amendment United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process or law; nor shall private property be taken for public use, without just compensation.

14th Amendment United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutes:

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On April 20, 1995, the plaintiff, Alabama Power Company (APCO), filed a complaint against the defendants, Hugh and Johnny Powell (the Powells), alleging that the Powells engaged in illegal filling in the flood easement contiguous to Logan Martin Lake, a reservoir of the Coosa River. (App. 4d) On November 19, 1996, the Powells filed a counter-claim stating that APCO, a federal actor, enforced its rules and regulations governing the flood easement on the Coosa River and Logan Martin Lake in an arbitrary and capricious manner. These vague and unclear standards resulted in unequal and discriminatory treatment of property owners on Logan Martin Lake. Specifically, the Powells alleged that they had been deprived of the use of their property

compared to other similarly situated property owners. On April 1, 1997, the Powells amended their counterclaim alleging that control of the flood waters of the Coosa River, a navigable river, and the Logan Martin Dam Reservoir is a traditional government function. APCO had been assigned this duty by virtue of the power delegated or assigned to it by the Federal Power Commission (FPC) and its successor, the Federal Energy Regulatory Commission (FERC) . (App. 3e) On December 19, 1996, APCO filed a motion to dismiss the defendants counterclaim for failure to state a claim alleging that there was no governmental action. (App. 2f) Federal action is a prerequisite for maintaining a suit under the Fifth Amendment to the United States Constitution. The circuit court granted this motion on May 13, 1997, agreeing that no government action was present. (App. 1a) Thereafter, the Powells appealed to the Supreme Court of Alabama. The trial court's ruling was affirmed on April 17, 1998, with no opinion. (App. 1b) Application for rehearing was denied on June 19, 1998. (App. 1c)

◆

SUMMARY OF ARGUMENT

Because the public function test or the nexus test for governmental action are satisfied, APCO is a government actor for the purpose of maintaining a discrimination claim

for a violation of due process under the Fifth Amendment.

When a private actor performs functions traditionally reserved to the sovereign, government action is present for the purpose of a claim under Bivens v. Six Unknown Agents of Narcotics, 403 U.S. 388 (1971) (Bivens claim). Marsh v. Alabama, 326 U.S. 501 (1946); Evans v. Newton, 382 U.S. 296 (1966). APCO is exercising a traditional government function, because flood control of rivers is a power delegated to the federal government through the Commerce Clause. State of Oklahoma v. Guy Atkinson, 313 U.S. 508 (1941); Pennsylvania Water and Power Company v. Federal Power Commission, 123 F.2d 155 (D.C. Cir. 1941). This power is exercised pursuant to the federal government's authority over navigable waterways. United States v. Twin City Power Company, 350 U.S. 222 (1956). Thus, because APCO's right to regulate flood waters on the Coosa River is a traditional government function, Hansen v. Salt Lake City, 794 P.2d 838 (Utah 1990); Shell Oil Co. v. Board of Commissioners of Lake Ponchartrain Levee District, 336 So.2d 248 (La. Ct. App. 1946) it is a federal actor for the purpose of maintaining a Bivens claim when it impermissibly discriminates in exercising this authority. Marsh v. Alabama, supra; and Evans v. Newton, supra.

When there is a sufficiently close nexus

between the government and a duty delegated to a private entity by the government, federal action is present so as to allow a Bivens claim. Jackson v. Metropolitan Edison, 419 U.S. 345 (1974); Condosta v. Vermont Electric Cooperative, Inc., 400 F.Supp. 358 (D. Vt. 1975). The conduct engaged in by APCO, flood control on a navigable waterway, constitutes a sufficiently close nexus between it and federal government.

REASONS FOR GRANTING THE WRIT

In affirming the Order of the trial court, the Supreme Court of Alabama has misinterpreted the applicability of a Fifth Amendment Bivens claim where there is discrimination in the regulation of easements acquired pursuant to a federal license to control flooding on navigable waters. APCo asserts that because it is a private entity it may discriminate with impunity on the grounds of race, religion, friendship, or for other equally trivial reason. This argument was adopted by the trial court and on appeal, by the Supreme Court of Alabama based on an erroneous interpretation of this Court's ruling in Jackson v. Metropolitan Edison. The Powells, as owners of property located along the Coosa River, maintain that they should be subject to the same rules and regulations as other recreational vehicle park and campground operators located on the river and that these rules and regulations should be uniformly and fairly enforced.

The issue presented on this appeal is straight-forward: Is flood control on the Coosa River a governmental function or not? If it is, then a private entity who accepts this responsibility should perform it in a non-discriminatory manner so that all individuals who are conducting legitimate businesses on the river will be treated equally and fairly. If it is not a governmental function, then the Powells, other business proprietors, as well as residential property owners may be subject to the whims of APCo and to prejudicial treatment.

What may or may not be done on property immediately adjoining Logan Martin Reservoir (essentially all of which is in the flood easement) has enormous economic consequences for the property owners. This is also true for other property owners adjoining the many rivers, lakes and reservoirs in the United States where flood control has been delegated by the Federal government to utility companies or other private entities. Therefore, because this is an issue of first impression effecting the property rights of many citizens of this country, the Powells request that this Petition for Certiorari be granted.

ARGUMENT

I. APCo IS A FEDERAL ACTOR FOR THE PURPOSE OF A FIFTH AMENDMENT BIVENS CLAIM FOR DISCRIMINATION IN THE REGULATION AND ENFORCEMENT OF ITS FLOOD EASEMENTS ACQUIRED AS A CONSEQUENCE OF THE FEDERAL GOVERNMENT DELEGATING TO IT THE DUTY TO REGULATE AND CONTROL FLOODING ON THE COOSA RIVER AND LOGAN MARTIN RESERVOIR.

It is a general proposition of law that a motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the claimant cannot prove any set of facts in support of his claim which would entitle him to relief. St. Marie & Son, Inc. v. Hartz Mountain Corp. 414 F. Supp. 71 (D.C. Minn 1976). Similarly, a motion to dismiss for failure to state a claim admits for the purposes of the motion the facts alleged in the complaint but challenges the claimants right to relief based upon those facts. Ward v. Hudnell, 366 F. 2d 247 (5th Cir. 1966); American Technical Machinery Corp. v. Masterpiece Enterprises, Inc., 235 F. Supp. 917 (M.D. Pa, 1964). The trial court determined under the claim alleged in Powells' amended counterclaim that APCo, as a private entity, could not be liable under a Fifth Amendment claim predicated upon Biven v. Six

Unknown Agents of Narcotics, 403 U.S. 388 (1971). As will more fully appear below, APCo was a federal actor for the purposes of the alleged claim and, therefore, would be liable under a Bivens claim if the alleged facts were proven to the satisfaction of a trier of fact.

The Fourteenth Amendment forbids any action that deprives a citizen of due process of law. On the other hand, purely private conduct does not offend the Constitution and, therefore, some amount of state action is necessary to maintain a cause of action under this amendment. Civil Rights Cases, 109 U.S. 3 (1883). Essentially, the state action doctrine requires that there be a relationship between the state and the private actor before the actions of the private entity may be actionable under the Fourteenth Amendment. Moose Lodge v. Irvis, 407 U.S. 163 (1972).

42 U.S.C. § 1983 (hereinafter § 1983) provides a statutory remedy for violations of civil rights by anyone acting "under color of law." This Court has previously determined that the "under color of law" language in § 1983 has the same interpretation as the state action analysis under the Fourteenth Amendment. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). Thus, state action must be present in order for a plaintiff to obtain redress for violations of his civil rights under § 1983.

It is well established that civil rights

violations under § 1983 only apply to private entities that have some relationship with state entities. Moose Lodge No. 107 v. Irvis, 407 U.S. at 163. Section 1983 state action analysis was first applied to federal entities in order to find an actionable claim under the Fourth Amendment to the Constitution in Bivens. The requirement of federal action using a §1983 state action analysis is also necessary to sustain a claim for a violation of the Fifth Amendment. Lake Country Estates, Inc. v Tahoe Regional Planning Agency, 440 U.S. 391 (1979). Virtually the same analysis is used to determine whether federal action is present as is used to determine state action under § 1983, and, therefore, state action cases are applicable in determining the presence of federal action under a Fifth Amendment Bivens claim. Morast v. Lance, 807 F.2d 926 (11th Cir. 1987).

In Morast, the Eleventh Circuit articulated a number of tests to identify the presence of state action. Using the first test, the public function test, state action is present "where the government has delegated to a private party a power 'traditionally exclusively reserved to the state.'" Id. at 931. Under the second method, the nexus test, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Id. at 931.

Both of the above-mentioned tests focus on the relationship between the state and a private actor, and it is irrelevant whether there is also an underlying contract or tort claim. An analysis of the cases reveals that in most § 1983 cases the underlying wrongful conduct involves a state tort law violation. Similarly, in the case at bar, APCo has a flood easement, a private property right, and seeks to enforce its rights against the fee simple owners, in those instances where it contends that there has been an interference with its easement. However, APCo's right to control flooding in the case at bar is predicated upon its obligation and duty of flood control on the Coosa River. This obligation and duty was delegated to APCo pursuant to a license from the Federal Power Commission and it is not predicated upon any common law nor statutory duty imposed on private citizens to regulate flooding.

A. Since flood control of navigable waterways was traditionally a power exclusively reserved to the sovereign, APCo is performing a public function and, therefore may be subject to liability under a Bivens claim.

1. A private actor conducting an activity traditionally reserved to the government may be liable under Bivens for a

violation of the Fifth Amendment.

Under the public function test, state action is present in situations where the government has delegated to a private party a power "traditionally reserved to the state." Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). The law is well settled that where a private actor has assumed a public function, then state action exists for purposes of a Bivens claim. See Barron v. Carson, 410 F. Supp. 299 (N.D. Ill. 1976), Perez v. Sugarman, 499 F.2d 761 (2nd Cir. N.Y., 1974), Voykto v. Ramada Inn of Atlantic City, 445 F. Supp 315 (D.C., N.J., 1978). On the other hand, it is equally clear that no liability attaches when state action is not present. Therefore, the critical inquiry is whether the activity in question is one of a public or private nature. Thus, "even where the actor is not a state entity, but rather a private one, through a traditional state action analysis it may be deemed a 'state actor' by virtue of the functions it performs and its relationship with the state." Newton v. Southeast Alabama Gas District, 708 F.Supp 1254, 1257 (M.D. 1989).

In Jackson, 419 U.S. at 345, the plaintiff alleged that a utility company terminated her service without due process. Although this court did not view the distribution of electricity as a power traditionally reserved to the government, it noted "that "if we are dealing with the

exercise ...of some power delegated to...[the defendant] by the state *which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."* Id. at 353.

In Marsh v. Alabama, 326 U.S. 501 (1946), a Jehovah's witness was arrested for distributing religious materials on the streets of a company town. This Court first recognized that had this been a municipal town, her conviction would have been reversed. Id. at 504. The Court then reasoned that even though the company owned the town,

> ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Id. at 506.

This Court further noted that the area in which the materials were being passed was freely accessible to the public. Id. at 507. Most importantly, this Court ruled that the company was performing the same functions that would be performed in a municipal town. Id.

Thus, Marsh held that private ownership does not allow the company to enforce its rules and regulations upon the general public restricting free speech when the public had

uninhibited access to the property owned by the company. Moreover, because operating a town is a function traditionally reserved to the state, the company was a state actor and could not impose criminal punishment against the defendant under the Fifth and Fourteenth Amendment guaranteeing free speech.

Similarly, in Evans v. Newton, 382 U.S. 296, this Court found that parks were serving a municipal function and were, as a consequence, state actors. This Court recognized:

> [w]hat is 'private' action and was is 'state' action is not always easy to determine...Conduct that is formally private may become so entwined with governmental policies or so impregnated with governmental character as to become subject to constitutional limitations placed on state action. Id. at 299.

Thus, this Court ruled that a park, willed to the city for use by whites only, could not exclude blacks without violating the Equal Protection Clause. Even though the park was supervised by a board of trustees, the Court concluded that operating a park is a municipal function traditionally controlled by the state. Parks are an element of mass recreation, therefore the Court ruled that they operate "in the public domain." Id. at 302. Thus, state action was present under the public function test,

because operating a public park freely accessible to the general public is a function traditionally reserved to the government.

It is uncontroverted that private actors are liable under Bivens for discrimination in the performance of functions traditionally performed by the government. Therefore, even though Jackson involved a utility company, the holding in that case does not control the case at car, because this case involves powers **delegated to** APCo **by the sovereign**. As previously mentioned the function being challenged in Jackson was the alleged improper termination of electrical service. Flood control differs from the termination of electrical service in that, like eminent domain, it is a power "traditionally associated with sovereignty" and was delegated to APCo through its license with the FPC. Jackson, 419 U.S. at 353.

It is also interesting to note that the license from the FPC delegated the sovereign power of eminent domain to APCo just as it delegated to APCo the authority to control flooding. Both are traditional government functions, which when performed improperly by a private actor, are sufficient to establish a Fifth Amendment Claim.

Also, it is irrelevant whether or not the public activity being conducted is incidental to the primary business of the private actor. In Marsh, this Court found sate action present even

though operating a company town was incidental to operating a company. Similarly, the exercise of eminent domain may be incidental to the production of electricity. See Jackson. Thus, the inquiry that must be made under the public function test is whether or not the private actor is conducting a traditional government function in conjunction with its normal business operation. The fact that its principle activity is a non-governmental function is axiomatic otherwise it would not be a private actor in the first place. In sum, a private actor performing a traditional governmental function satisfies the governmental function necessary to predicate liability under Bivens.

> 2. In acquiring and maintaining flood easements on the Coosa River and Logan Martin Reservoir, APCo is exercising a traditional government function which, in the case at bar, was delegated to it by the federal government through the FPC.

Flood control is a traditional government function, therefore APCo is acting in lieu of the sovereign when it purports to control the flood easement on navigable waterways. Navigable waters are public property and are not subject to private ownership. Green and B.R. Navigation Co. v. Chesapeake A and S. W. R. Co., 10 S.W. 6 (Ky. Ct. App. 1888). Thus, Congress has full power over flood protection, watershed development, and recovery of the cost of

improvements through the utilization of power under the Commerce Clause. State of Oklahoma v. Guy Atkinson, 313 U.S. 508 (1941).

In United States v. Twin City Power Company, 350 U.S. 222, 224-225 (1956), this Court stated:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege we have called a 'dominant servitude.'

Furthermore, all navigable rivers are controlled by Congress even though portions of the rivers may not be navigable, and Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions. State of Oklahoma v. Guy Atkinson, 313 U.S. at 508, 523 (1941).

In Pennsylvania Water and Power Company v. Federal Power Commission, 123 F.2d 155 (D.C. Cir. 1941), the Pennsylvania Court of Appeals observed that the power of the United States over its public waterways extended

to flood protection, and "the fact that ends other than flood control may be served or that flood control may be of relatively less importance does not invalidate the exercise of authority conferred on Congress." United States v. Grand River Dam Authority, 363 U.S. 229 (1960). Thus, simply because the production of electric power is the primary function of a business when that business also involves regulation and control of the flood waters of a navigable stream, the Coosa River, the utility company then undertakes a federal function that is distinct from the production of electricity.

In 33 U.S.C. § 701(a), it is stated:

> It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of land. . . constitutes a menace to the national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the federal government in cooperation with the states . . .

Pursuant to 33 U.S.C. § 701 (c-1), the Secretary of the Army has been given jurisdiction by Congress to establish rules, regulations, and acquire easements for the purposes of flood control on the navigable rivers of the United States. Also, by virtue of 16 U.S.C. § 797, the

Federal Power Commission was granted the authority to issue licenses to construct, operate, and maintain dams across navigable streams for the purposes of generating electrical power. Importantly, these licenses issued by the Federal Power Commission are subject to the approval of the Secretary of the Army. It is also noteworthy that pursuant to 42 U.S.C. § 7172, the Federal Power Commission is authorized to regulate and control the construction and operation of dams on navigable waterways.

In the case at bar, the federal government granted permission to APCo in the form of a license from the Federal Power Commission to allow the construction, operation, and maintenance of the Logan Martin Dam Project, a project that has authority over hydroelectric power, flood control, and navigation. (App. 1g) This project is located on navigable waters and as a result it must be best suited for the use and benefit of interstate commerce. (App. 1g) It is by virtue of this license that APCo is allowed to conduct its utility operation on public property, i.e. the Coosa River.

APCo has thus assumed control of public lands and public waters through this license with the federal government. APCo has even admitted in its complaint that its authority to flood property along the Coosa River was granted to it under an order of the United States District Court (App. 3d) It has also assumed

all liability for any damage which results from flood control. (App. 25g) This right to control flooding was solely based upon the delegation of authority by the federal government to APCo through the FPC, and was *not* based upon any common laws or statutory rights granted to APCO under the real property laws of the State of Alabama. APCo also states in its Complaint:

> The filling activity conducted and/or allowed by the Defendants, J. Powell, H. Powell, A, B, C, D, and F deprives APCo of flood storage capacity and generating capacity. (App. 4d)

The very basis of APCo's objection to fill material being placed in the flood easement is that such material reduces the flood storage capacity in the Logan Martin Lake Reservoir. APCo further maintains that it has an obligation to the Federal Power Commission to maintain this capacity at a certain level. (App. 4d) Thus, APCo's assertions that its rights to maintain and enforce its flood easement are not pursuant to a grant of federal authority lack credulity.

In summary, APCo's right to ownership and maintenance of flood easements in the Logan martin Reservoir is the basis for its original complaint as well as the Powells' counterclaim. APCo could not maintain flood easements on the Reservoir but for the authority delegated to it by the FPC. The right to control flooding of public waters such as navigable

rivers is vested in the sovereign and not in private entities. Therefore, APCo has the right to acquire and maintain the subject easements pursuant to its flood control authority, a traditional government function delegated to it by the Federal government through the FPC.

Because flood control is a traditional government function, state action is present in APCo's regulation of flood easements on the Coosa River. Although there are no cases applying state action analysis to flood control, several state courts have specifically noted that flood control is a traditional government function. The Supreme Court of Utah recognized flood control as state action when faced with the issue of whether the government was liable for damage to the plaintiff's property following an alteration of a creek as part of its flood control program. Hansen v. Salt Lake County, 794 P. 2d 838 (Utah, 1990). In Hansen, the court upheld a state statute which stated in part, "[t]he management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by government entities are considered to be governmental functions." Id. at 841.

Also, in Shell Oil Co. v. Board of Commissioners of Lake Ponchartrain Levee District, 336 So. 2d 248 (La., 1976), the Louisiana Court of Appeals ruled that flood control was a traditional government function in addressing the ownership of mineral rights. Specifically, the

court stated, "we hold that a levee district, which was created as an arm of the executive branch of government for the purpose of carrying out a government function, i.e. flood control, is the state..." Id. At 253.

In the case at bar, APCo is a federal actor because it is performing a traditional government function delegated to it by the Federal government by regulating flood easements on a navigable waterway. The FPC has delegated numerous duties to APCo pursuant to this general obligation to control flooding. APCo has responsibilities regarding water storage and distribution, which includes obligations with respect to flood control. (App. 14g) Pursuant to this transfer of authority, APCo has released the federal government from all liability. (App. 25g)

Because APCo is now responsible to the public by virtue of its FPC license and is acting in place of the federal government, it must conduct its activities relating to flood control in a nondiscriminatory manner. The primary issue involved in this action is whether a private entity can establish vague rules concerning how much chert can be placed in the flood easements along the Coosa River, and then allowing departmental employees complete discretion in deciding exactly what amounts will be allowed. These guidelines are a clear formula for abuse and discrimination against those owning property on the Coosa River. In sum, APCo is a state actor,

because it has the power to acquire and maintain flood easements along the river, a traditionally government function, and as a result it must not be allowed to discriminate against some property owners while failing to take action against others who have engaged in the same or similar behavior.

B. State action is present because there is a sufficiently close nexus between APCO's authority to control floods through the maintenance of easements and the federal government.

State action may also be demonstrated by using the nexus test. Morast, supra. This Court articulated the test stating,

> [t]he inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as the state itself. Jackson, 419 U.S. at 351.

In Moose Lodge No. 107, the plaintiff, a black man, was denied service at a private club. 407 U.S. at 163. He alleged that because the state had issued the club a liquor license, state action was present. The court rejected the plaintiff's equal protection claim noting that the club was not open to the public at large, "nor is it located and operated in such surroundings that

although private in name, it discharges a function or performs a service that would otherwise in all likelihood be performed by the state." Id. at 175. Thus, this Court held that mere licensing of a private entity does not constitute state action. Unlike the license at issue in Moose Lodge, however, the purpose of the APCo license is not to regulate a certain activity. The license issued by the FPC to APCo delegates the duty of flood control to the power company, a duty which was traditionally reserved to the federal government. The case at bar is also distinguishable from Moose Lodge, because APCo is licensed to control flooding on a public waterway. Thus, unlike the club in Moose Lodge APCo is controlling flood waters, on a public river thereby discharging a function that would otherwise be performed by the sovereign.

In Jackson, the plaintiff brought an action against a utility company for terminating her electrical service without due process. Jackson, 419 U.S. at 347. This Court reasoned that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment. Nor does the fact that it is extensive and detailed do so." Id. at 357. Essentially, this Court concluded that even though the utility was heavily regulated, enjoyed a partial monopoly, and used a means approved by the utility commission to terminate the plaintiff's service, the utility was not a state

actor *when it was performing the limited function of distributing electrical service. Id* at 358. Jackson differs from the case at bar because the conduct at issue is not termination of electrical service, rather the activity in question is the regulation of flood easements along the Coosa River. As previously stated, APCo's duty to control flooding was delegated to it through a license issued from the Federal Power Commission.

In Gay Law Students Association v. Pacific Telegraph and Telephone, 595 P.2d 592 (Cal. 1979), the Supreme Court of California ruled that there was a sufficiently close nexus between a public utility and the state. In interpreting the California Constitution, the Court followed a federal analysis, ruling that the utility's regulatory ties, the utility's monopoly status, and the public's inability to disassociate itself from the utility made the utility a state actor. The court distinguished Jackson, emphasizing the fundamental difference between using hiring practices to promote a private prejudice and a decision to terminate a customer's electrical service due to her failure to make payments. Id. at 472-473. The essential distinction between these two cases is the particular conduct in which the defendant was engaged. Thus, courts have found that a public utility can be a state actor using the nexus test when the conduct at issue indicates a sufficiently close nexus between the public utility and the

state.

In Condosta v. Vermont Electric Cooperative, Inc., 400 F.Supp 358 (D. Vt. 1975), the federal district court held that the defendant public utility was a government actor for purposes of § 1983. The plaintiff brought a civil rights action, because his electrical service was terminated after he failed to pay a bill. Id. at 360. Unlike the defendant in Jackson, the public utility in Condosta terminated the plaintiff's electrical service pursuant to instructions from a state agency, and the utility was involved in negotiations with a state agency prior to the termination of the plaintiff's service. Id. at 364-365. The court held that the allegations constituted a "sufficiently close nexus between the state and the public utility that the utilities actions may be fairly treated as that of the state itself." Id. at 365; Jackson, 419 U.S. at 351.

Similarly, in the case at bar a sufficiently close nexus exists between APCo and the federal government. Pursuant to the license issued by the FPC, the Chief of the U.S. Corp of Engineers and the Secretary of the Army were required to give prior approval before APCo could commence with plans or build any structures relating to flood control. Once the dam became operational, the FPC required that APCo's duties in regard to flood control be conducted in accordance with the

rules established by the Secretary of the Army (App. 14g) Furthermore, the FPC reserved the right to require APCo to get prior approval before seeking any alterations in the storage capacity of the lake. (App. 7g) Finally, the FPC reserved the right to construct, complete, or approve navigation facilities (App. 13g) and APCo is required to provide power for the operation and maintenance of these facilities. Thus, not only must there be approval by the FPC before APCo can make changes related to flood control, (See Condosta, supra) but the FPC "has...put its weight on the side of the proposed practice" by delegating the duty to regulate and control flooding to APCo. Jackson, 419 U.S. at 357. As a result, a sufficiently close nexus exists between APCo and the Federal government that APCo "may be fairly treated as the state itself." See Jackson, 419 U.S. at 351.

CONCLUSION

For the reasons stated, the Powells respectfully request that certiorari be granted.

Respectfully submitted,

William J. Trussell
Attorney for Petitioners

Of Counsel:

Trussell & Funderburg, P.C.
1916 First Avenue, North
Pell City, Alabama 35125
(205) 338-7273

APPENDIX A

IN THE CIRCUIT COURT FOR ST. CLAIR COUNTY, ALABAMA
SOUTHERN JUDICIAL DIVISION
AT PELL CITY

ALABAMA POWER COMPANY,

Plaintiff,

vs.

CASE NO. CV 95-93

JOHNNY POWELL, et al.,

Defendants.

AMENDED ORDER

The Court is of the opinion that its Order dismissing the Defendants' Counterclaim dated April 22, 1997 should be amended pursuant to Rule 54 of the Alabama Rules of Civil Procedure so as to direct an entry of final judgment as to the Defendants' claims. It is therefore ORDERED, ADJUDGED and DECREED that said Order of April 22, 1997 be amended as follows:

This Court, having considered Plaintiff Alabama Power Company's ("APCo") Motion to Dismiss Defendants' original and Amended Counterclaim, all submissions of the parties, oral arguments, and relevant law,

hereby orders that the Defendants' Counterclaim and Amended Counterclaim are due to be dismissed, with prejudice, pursuant to Rules 12(b)(6) and 56 of the Alabama Rules of Civil Procedure, and says as follows:

Defendants' Counterclaim and Amended Counterclaim .assert that APCO, as the owner of a license issued by the Federal Energy Regulatory Commission ("FERC"), and through APCo's operation of the flood easement adjacent to the Logan Martin Dam reservoir, has deprived the Defendants of the use and enjoyment of their real property without due process of law, in violation of their rights under the Fifth Amendment and Fourteenth Amendment of the United States Constitution, and under 42 U.S.C. § 1983. Specifically, Defendants assert that APCo's operation of its reservoir for the generation of power, which includes some elements of shoreline regulation and flood control, constitutes action under color of federal law, or, "state action." Defendants have offered no authority to support this position; in fact, the authority submitted to this Court by all parties establishes that APCo's activities are private, as opposed to actions of the FERC or the federal government.

It is the opinion of this Court that APCo's operation of its reservoir for the generation of power, which necessarily includes elements of shoreline regulation and

flood control, does not amount to state action, necessary to support Defendants' Counterclaim and Amended Counterclaim against APCo. Because Defendants fail to show that APCo's operation of its reservoir is state action under any test, Defendants' Counterclaim and Amended Counterclaim are due to be dismissed. The Court further finds that an entry of final judgment dismissing the Defendants Counterclaim promotes judicial economy in that it eliminates the potential for two (2) trials and such entry would be in the best interest of the Plaintiff and Defendants and that there is no just reason to delay an entry of final judgment.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Defendants' Counterclaim and Amended Counterclaim are dismissed with prejudice. It is further ORDERED, ADJUDGED and DECREED that there is no just reason to delay entry of a final judgment dismissing the Defendants' Counterclaim and the Court therefore directs the entry of a final judgment dismissing said Counterclaim.

DONE this 13th day of May, 1997.

/s/ Robert E. Austin
Circuit Judge

APPENDIX B

RELEASED

April 17, 1998

CLERK OF THE
SUPREME COURT
OF ALABAMA

STATE OF ALABAMA--JUDICIAL
DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1997-98

1961572

Johnny Powell and Hugh B. Powell v. Alabama Power Company, Appeal from St. Clair Circuit Court (CV-95-93).

COOK, JUSTICE.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(E), Ala. R. App. P.

Hooper, C. J., and Almon, Houston, and Lyons, ii., concur.

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

June 19, 1998

1961572

Johnny Powell and Hugh B. Powell v. Alabama Power Company (St. Clair: CV 95-93)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

COOK, J. - Hooper, CJ., Almon, Houston and Lyons, JJ. concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this the 19th day of June, 1998.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA

ALABAMA POWER COMPANY, a corporation,

Plaintiff,

VS.

CIVIL ACTION NO.
CV 95-93PH

JOHNNY POWELL, an individual; HUGH B. POWELL, JR., an individual; A, B, C, D, E, or F, those legal entities who own or have owned an interest in, or who have caused, or allowed to be placed, fill material on or in the property that is the subject of this litigation and is more particularly described herein, all of whose names and identities will be supplied by substitution when ascertained,

Defendants.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS, DECLARATORY RELIEF, AND DAMAGES

Plaintiff, ALABAMA POWER COMPANY ("APCo"), a corporation, for its complaint, alleges as follows:

Introduction

1. This is an action requesting the court to grant a temporary restraining order, preliminary and permanent injunctions, and money damages, together with other equitable relief, for various reasons, including to preserve the status quo and to declare the parties' rights and obligations with respect to certain real property located in St. Clair County, Alabama.

Parties

2. APCo is a corporation organized under the laws of the State of Alabama, is the owner of certain lands in St. Clair County which are the subject of this litigation, and is the owner of a license, issued by the Federal Energy Regulatory Commission (" FERC"), by which authority it operates the Logan Martin Dam Reservoir, a portion of which is located in St. Clair County, Alabama.

3. Johnny Powell ("J. Powell") and Hugh B. Powell, Jr. ("H. Powell") are resident citizens of St. Clair County, Alabama and own or claim an interest in certain lands in St. Clair County, Alabama located in the NE 1/2 of the NW 1/2 of Township 1 8 South, Range 4 East, Section 6, portions of which are adjacent to lands owned by APCo, which lands comprise a portion of the Logan Martin Dam Reservoir. All of such property is collectively referred to hereinafter as the "Powell property."

4. Defendants A, B, C, D, E, and F, are entities who own or have owned interests in, or who have caused or allowed to be placed fill material between the Powell property and certain offshore islands, all of whose names and identities will be supplied by substitution when ascertained.

Facts

5. By an Order of the United States District Court in eminent domain proceedings, dated August 19, 1965, APCo acquired an interest in certain real property (the "subject property") located within Sections 5 and 6, Township 18 South, Range 4 East, in St. Clair County, Alabama, which lay below that certain datum plane of 473.5 feet above mean sea level as established by the United States Coast and Geodetic Survey, as adjusted in January, 1955. The Order is attached as Exhibit A, which is incorporated herein as if set out in full. The subject property comprises a portion of the Logan Martin Dam Reservoir.

6. Also pursuant to that Order, APCo acquired the right to flood 40.5 additional acres, more or less, of the Powell property from time to time, such acreage lying between the elevation of 465 feet above mean sea level and the elevation of 473.5 feet above mean sea level.

7. The real estate records pertaining to the subject property and portions of the Powell

property demonstrate that the boundaries of the properties are determined by elevation.

8. Defendants J. Powell, H. Powell, A, B, C, D, E, and F have caused or allowed, and are causing or allowing, fill material to be placed on the subject property between the Powell property and one or more offshore islands within the boundaries of the Logan Martin Dam Reservoir.

9. The filling activity described herein constitutes an unauthorized landfill and has occurred, at least in part, on the subject property.

10. The filling activity conducted and/or allowed by Defendants J. Powell, H. Powell, A, B, C, D, E, and F constitutes a continuing trespass onto the subject property.

11. The filling activity conducted and/or allowed by Defendants J. Powell, H. Powell, A, B, C, D, E, and F deprives APCo of flood storage capacity and generating capacity.

12. APCo has called upon the Powells to cease the unauthorized filling activity, but to no avail.

13. By continuing to allow the filling activity to occur after being requested to cease, the activity caused or allowed by Defendants J. Powell, H. Powell, A, B, C, D, E, and F constitutes trespass after warning.

Procedural Allegations

14. Unless Defendants J. Powell, H. Powell, A, B, C, D, E, and F are enjoined from conducting and/or allowing this activity, APCo will suffer irreparable harm in that the project boundaries of a reservoir operated under a license from the FERC will be changed without prior approval, thereby potentially exposing APCo to adverse federal action.

15. The actions of Defendants J. Powell, H. Powell, A, B, C, D, E, and F are willful and intentional and will continue unless enjoined by this Court.

16. APCo has no adequate remedy at law to prevent the activity.

17. No injury will be sustained by the defendants through issuance of temporary and preliminary injunctive relief, prohibiting the defendants from further filling activity, and permitting APCo access to the site for testing and examination.

18. Counsel for APCO certifies by signing this pleading that pursuant to Rule 65(b)(2) of the Alabama Rules of Civil Procedure he has attempted to notify Defendants J. Powell and H. Powell by providing telephonic notice of the filing of this complaint, including the request for temporary restraining order, to them at (205) 338-2935 and, as shown by the foregoing, no

further notice ought to be required.

Claim for Relief

WHEREFORE, PREMISES CONSIDERED, Alabama Power Company respectfully request the court as follows:

19. To issue a temporary restraining order both (a) prohibiting Defendants from causing or allowing further filling activity on the subject property, (b) requiring that Defendants remove all fill material placed between the Powell property and the subject property, and (c) permitting APCo and its representatives to have access to both the subject property and the Powell property for the purpose of conducting testing and examination of the land as may be necessary and as are described hereinabove, pending a hearing on the preliminary injunction sought herein;

20. To issue a preliminary injunction both (a) prohibiting Defendants from causing or allowing further filling activity on the subject property, (b) requiring that Defendants remove all fill material placed between the Powell property and the subject property, and (c) permitting APCo and its representatives to have access to both the subject property and the Powell property for the purpose of conducting testing and examination of the land as may be necessary and as are described hereinabove, pending the final hearing and determination of

this cause;

21. To issue a permanent injunction both (a) prohibiting Defendants from causing or allowing further filling activity on the subject property, (b) requiring that Defendants remove all fill material placed between the Powell property and the subject property, (c) permitting APCO and its representatives to have access to both the subject property and the Powell property for the purpose of conducting testing and examination of the land as may be necessary and as are described hereinabove.

22. To declare the rights of the parties, to quiet title, and to establish the boundary line with respect to the subject property and the Powell property.

23. To order that Defendants remove all fill material placed both (a) on the subject property, and (b) on the Powell property in violation of State and/or federal law, or in such manner that it adversely impacts the subject property or APCo's rights in any way.

24. To award money damages, both compensatory and punitive, against Defendants, in favor of APCo, for trespass and trespass after warning.

25. To include in its orders any further and additional relief to which APCo may be entitled, including the reimbursement of the

costs and attorneys' fees incurred by it in this action.

/s/ Steven F. Casey
Steven F. Casey

/s/ R. Bruce Barze, Jr.
R. Bruce Barze, Jr.

Attorneys for Plaintiff
Alabama Power Company

OF COUNSEL:

BALCH & BINGHAM
Post Office Box 306
Birmingham, Alabama 35201
(205) 251-8100

SERVE DEFENDANTS BY CERTIFIED MAIL

Defendant's Addresses:

Mr. Hugh B. Powell, Jr.
223 3rd Street, North
Pell City, Alabama 35125

Mr. Johnny Powell
Rt. 1, Box 162
Ragland, Alabama 35131

VERIFICATION

STATE OF ALABAMA

JEFFERSON COUNTY

Robert E. Southerland, being by me duly sworn deposes and says as follows:

1. I am a Real Estate Specialist of Alabama Power Company and am duly authorized to make this verification. I am over the age of twenty-one and am competent to testify.

2. Upon information and belief, I state that the facts set forth in the foregoing Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions, Declaratory Relief, and Damages are true and correct to the best of my information, knowledge and belief.

/s/ Robert E. Southerland

Sworn to and subscribed before me on this the 20th day of April, 1995.

/s/ Sandra W. Sadler
Notary Public

My commission expires: 10/22/98

IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ALABAMA
MIDDLE DIVISION

ALABAMA POWER COMPANY,
a corporation

Plaintiff

CIVIL ACTION

No. 1287

vs.

6,100 acres, more or less, of land in Filed in Clerk's Office St. Clair, Calhoun, and Talladega Northern District of Alabama Counties, Alabama, and Everette Francis August 19, 1965 Poe, et al

Defendants

FINAL ORDER AND DECREE
DISTRIBUTING IN FULL ALL
FUNDS WITH REGARD TO
TRACT #184

This cause coming on to be heard, and being submitted for final decree upon the pleadings and petition filed this day by H. B. Powell and Roberta Powell, through their attorney, and the same being understood by the Court, it is ORDERED, ADJUDGED AND

DECREED:

1. That Plaintiff herein acquire fee simple title to 214.3 acres, more or less, in Tract #184, such acreage lying below an elevation of 465 feet above mean sea level, and that plaintiff herein acquired the right to flood 40.5 additional acres, more or less, of Tract #184 from time to time, such acreage lying between the elevation of 465 feet above mean sea level and the elevation of 473.5 feet above mean sea level.

2. That just compensation to be paid to the owners of Tract #184 for the taking of such rights, title and interests, and for damage to the remaining lands, designated in paragraph 1 above, is $31,328.00, and that such sum constitutes the only amount and the only sum to be received by the owners of Tract #184.

3. That the parties in interest in Tract #184, and the only persons entitled to share in the sum of $31,328.00 heretofore deposed by plaintiff in this cause, are the persons named in paragraph 4 hereof. Such sum of $31,328.00 is hereby decreed to be the full, just and adequate compensation.

4. The parties in interest as to Tract #184 are H. B. Powell and Roberta Powell, represented by Mr. Maurice F. Bishop. Petitioners have heretofore withdrawn the sum of $28,480.00 in this cause. The Clerk of the

Court is hereby directed to draw a check in the sum of $2,848.00 payable to H. B. Powell, Roberta Powell, and Maurice F. Bishop, Attorney, and mail such check to Mr. Maurice F. Bishop, Attorney at Law, Frank Nelson Building, Birmingham, Alabama. The costs in this proceeding are taxed against the Plaintiff.

This August 19, 1965.

/s/ H. H. Graves

United States District Judge

APPENDIX E

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA
SOUTHERN JUDICIAL DIVISION
AT PELL CITY

ALABAMA POWER COMPANY,

Plaintiff,

vs. CASE NO.
CV 95-93 PA

JOHNNY POWELL, et al.,

Defendants.

AMENDMENT TO COUNTERCLAIM

COMES NOW, the Defendants, JOHNNY POWELL and HUGH B. POWELL, and amend their Counterclaim heretofore filed in this cause by restating Count I of said Counterclaim and by adding Count II.

COUNT I

1. That the Plaintiff, Alabama Power Company, is the owner of a license issued by the Federal Energy Regulatory Commission (FERC), a federal agency by which authority it operates the Logan Martin Dam Reservoir.

2. That pursuant to its license with the FERC, the Plaintiff acquired the right to flood real property lying contiguous to Logan Martin

Lake within 465 feet above mean sea level and 473.5 feet above mean sea level, said area, hereinafter called the Flood Easement.

3. That pursuant to the authority acquired from the FERC, the Plaintiff has purported to control activity of property owners within the Flood Easement.

4. That the rules and regulations purportedly adopted by the Plaintiff which it seeks to enforce against property owners within the Flood Easement are arbitrary, ambiguous, vague and uncertain.

5. That the activity of property owners within the Flood Easement is arbitrarily controlled by the Plaintiff and as a result of vague and unclear standards has resulted in unequal and discriminatory enforcement by the Plaintiff of rules and procedures within the Flood Easement.

6. That the Defendants own real property in the Flood Easement and by virtue of the capricious and arbitrary application of the Plaintiff of its rules within the Flood Easement, said Defendants have been deprived of the use of their property compared to other similarly situated property owners.

7. That the foregoing conduct of the Plaintiff under color of law has deprived the Defendants of the use and enjoyment of their

real property without due process of law.

WHEREFORE, PREMISES CONSIDERED, the Defendants, Johnny Powell and Hugh B. Powell, demand judgment against the Plaintiff, Alabama Power Company, for compensatory and punitive damages in such amount as a jury in this cause should deem just and proper.

COUNT II

8. That the Defendants adopt and incorporate herein by reference the allegations contained in paragraph 1 and paragraph 2 of Count II.

9. That the control of the flood waters of the Coosa River, a navigable river, and the Logan Martin Dam Reservoir is a traditional, governmental or public function and the Plaintiff's sole authority to control and regulate the Flood Easement along said bodies of water is by virtue of the power delegated or assigned to it by the Federal Power Commission and its successor FERC.

10. That the pursuant to the authority delegated or assigned to Plaintiff by the FERC, the Plaintiff has adopted rules and regulations which it seeks to enforce against property owners within the Flood Easement.

11. That the rules and regulations

purportedly adopted by the Plaintiff which it seeks to enforce against property owners within the Flood Easement are arbitrary, ambiguous, vague and uncertain.

12. That the activity of property owners within the Flood Easement is arbitrarily controlled by the Plaintiff and as a result of vague and unclear standards has resulted in unequal and discriminatory enforcement by the Plaintiff of rules and procedures within the Flood Easement.

13. That the Defendants own real property within the said Flood Easement on which they operate a recreational vehicle park and camp ground.

14. That as a result of the capricious and arbitrary application by the Plaintiff of its rules within the Flood Easement, the Defendants have not been allowed to utilize their property for legitimate business purposes as compared to other recreational vehicle and camp ground operators who own property within the Flood Easement.

15. That the foregoing conduct of the Plaintiff in purporting to control and regulate the Flood Easement of the Coosa River and Logan Martin Dam Reservoir constitute governmental action under the Fifth Amendment and the Fourteenth Amendment of the United States Constitution, and, pursuant to such color of law,

the Plaintiff has deprived the Defendants of the use and enjoyment of their real property without due process of law.

WHEREFORE, PREMISES CONSIDERED, the Defendants, Johnny Powell and Hugh B. Powell, demand judgment against the Plaintiff, Alabama Power Company, for compensatory and punitive damages in such amount as a jury in this cause should deem just and proper.

/s/ William J. Trussell
Attorney for Defendants

OF COUNSEL:
TRUSSELL & FUNDERBURG, P.C.
1916 First Avenue North
Pell City, Al 35125
PH: (205) 338-7273

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon the following by placing a copy of same in the United States Mail, postage prepaid and properly addressed, this the 31st day of March, 1997.

R. Bruce Barze, Jr., Esq.
Balch & Bingham
1710 6th Avenue North
Post Office Box 306
Birmingham, Alabama 35201

/s/ William J. Trussell
Of Counsel

APPENDIX F

IN THE CIRCUIT COURT FOR
ST. CLAIR COUNTY, ALABAMA
SOUTHERN JUDICIAL DIVISION
AT PELL CITY

ALABAMA POWER COMPANY,

Plaintiff,

vs.

CASE NO.
CV 95-93 PA

JOHNNY POWELL, et al.,

Defendants.

PLAINTIFF ALABAMA POWER COMPANY'S MOTION TO DISMISS DEFENDANTS' ORIGINAL AND AMENDED COUNTERCLAIM

Plaintiff Alabama Power Company ("APCo") moves this Court to dismiss the Defendants' original and amended counterclaim for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Alabama Rules of Civil Procedure, and says as follows:

1. Defendants' original and amended counterclaim purportedly alleges violations of the Equal Protection Clause and Due Process Clause of the United States Constitution and/or the Constitution of the State of Alabama. (See Complaint at ¶ 6-7); U.S. Const. amend. V;

ALA. CONST. of 1901, art. 1, §§ 1, 6, 13, and 22 (1975).

2. Assuming all allegations in the counterclaim to be true, APCO cannot be held liable under any constitutional cause of action, because the Defendants cannot show a sufficient nexus to support a finding of state action. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1 974).

3. State action is essential to constitutional claims against private businesses, including heavily-regulated utilities. Jackson v. Metropolitan Edison Co., 41 9 U.S. 345, 351 (1974) (dismissing a plaintiff's complaint against the Defendant power company on the basis of lack of state action). "The mere fact that a business is subject to state [or federal] regulation does not by itself convert its action into that of the State [or federal government] for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so." Jackson, 41 9 U.S. at 350.

4. The clear weight of state and federal authority compels dismissal. Alabama Power Co. v. Smith, 575 So. 2d 1084 (Ala. 1991) (holding as a matter of law that APCo's conduct in cutting off customer's power was not state action for due process purposes); Carlin Communication v. Southern Bell Telephone and Telegraph Co., 802 F.2d 1352 (11th Cir. 1986)

(holding that a privately owned telephone company's restrictions on message content in its pre-recorded "dial-it" message service was not state action).

5. APCO did not acquire the property rights made the basis of the counterclaim "pursuant to its license with the FERC," as alleged by Defendants. (Counterclaim at ¶ 1). Rather, by order of the United States District Court dated August 19, 1965, APCO acquired an easement giving it the right to flood those portions of the Defendants' property lying between the elevations of 465 feet above mean sea level and 473.5 feet above mean sea level. (See Exhibit A to Complaint). As owners of the servient estate, the Defendants must abstain from acts interfering with the proper enjoyment of the easement by APCO, the owner of the dominant estate. Brown v. Alabama Power Co., 156 So. 2d 153, 155 (Ala. 1963).

Wherefore, Plaintiff Alabama Power Company moves this Court to dismiss the Defendants' original and amended counterclaim for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Alabama Rules of Civil Procedure, as well as such further and different relief which the Court deems just and proper.

/s/ R. Bruce Barze, Jr.
One of the Attorneys for
Plaintiff Alabama Power
Company

OF COUNSEL:

Steven F. Casey
R. Bruce Barze, Jr.
BALCH & BINGHAM
Post Office Box 306
Birmingham, Alabama 35201

Billy L. Church
CHURCH, KENNEDY & SEAY, P.C.
1609 Cogswell Avenue
Pell City, Alabama 35125

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel of record by placing same in the U.S. mail, properly addressed and postage prepaid, on this the 2nd day of April, 1997.

William J. Trussell
TRUSSELL & FUNDERBURG, P.C.
Attorney at Law
1916 First Avenue, North
Pell City, Alabama 35125

/s/ R. Bruce Barze, Jr.
Of Counsel

APPENDIX G

COOSA RIVER PROJECT LICENSE
FERC NO. 2146
[Weiss, Henry, Logan Martin, Lay and Bouldin Dams]

INDEX

Article No.	Subject
1 - 27	Standard articles
28	Annual charges
29	Exhibits F and K
30	Revised Exhibit L; Henry and Logan Martin
31	Transmission facilities
32	Reservoir clearing
33	Construction schedules
34	Additional generating capacity
35	Actual cost determination
36	Actual cost of parts determination

37	Agency consultation on fish and wildlife
38	Acquisition of lands for flood control
39	U. S. rights to construct dams
40	Corps regulations for reservoir operation
41	Flood control storage; Logan Martin
42	Determination of additional annual charges
43	Mosquito control
44	Exhibit M; Lay
45	3rd unit installation; Weiss
46	Coordination of navigational concerns with Corps; Bouldin
47	Archaeological consultation; Bouldin

48	Recreational consultation; Bouldin

Article No.	Subject
49	Utilization of complete hydraulic capacity; Bouldin
50	Reservoir fluctuation; Henry
51	Recreational Use Plan
52	Rate of return on investment
53	Reconstruction schedule; Bouldin
54	Submittal of contract bid specs and Q.A. plan; Bouldin
55	Board of consultants; Bouldin
56	Instrumentation requirements and filling plan; Bouldin
57	Revegetation of borrow

	and spoil areas; Bouldin
58	SHPO consultation on borrow and spoil areas; Bouldin
59	Tailrace canal erosion study; Bouldin
60	Emergency Action Plan; Bouldin
61	Recreational facilities study; Bouldin
62	Construction schedule for Exhibit R recreational facilities
63	Tailrace fishing facilities; Bouldin
64	Standard land use article
65	SHPO consultation
66	Woodduck Nesting boxes; Weiss

Form L-6
December 15, 1953

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENSE
FOR UNCONSTRUCTION MAJOR
PROJECT
AFFECTING NAVIGABLE WATERS
AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in the order of the Commission, shall be subject to all the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, that if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval amended, supplemental, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. Said project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works under the license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in the project works or divergence from such approved exhibits may be made if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health, or property.

Article 4. The construction, operation, and maintenance of the project and any work incident to additions or alterations, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision

of the regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall furnish to said representative such information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow him and other officers or employees of the United States) showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties.

Article 5 Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the maps, plans, specifications, and statements approved by the

Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements.. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 6. For the purpose of determining the, stage and flow of the stream or streams from which water is to be diverted for the operation of the project works, the amount of water held in and withdrawn from storage, and the effective head on the turbines, the Licensee shall install and thereafter maintain such gages and stream-gaging stations as the Commission may deem necessary and best adapted to the requirements and shall provide for the required readings of such gages and for the adequate rating of such stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission and may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or upon the specific direction of the Commission. The installation of gages, the

ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of said project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 7. So far as is consistent with proper operation of the project, Licensee shall allow the public free access, to a reasonable extent to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purpose, including fishing and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may, in appropriate circumstances, be subject to payment of rent to the Licensee in a reasonable amount: Provided, that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection

of life, health, and property and Provided further, that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities.

Article 8. In the construction and maintenance of the project, the location and standards of roads and trails, and other land uses, including the location and condition of quarries, borrow pits, spoil disposal areas, and sanitary facilities, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 9. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the license, or in the maintenance of the project, such material shall be removed and deposited so it will not interfere with navigation, and will be to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 10. In the construction and maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines, and telegraph, telephone, and other signal wires or power transmission lines constructed

prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

Article 11. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction. None of the provisions of this article is intended to relieve the Licensee from any responsibility or retirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

Article 12. The Licensee shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such

officer; shall trim all branches of trees in contact with or liable to contact the transmission line; shall cut and remove all dead or leaning trees which might fall in contact with the transmission line; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 13. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works or in the clearing of said lands shall be paid for in accordance with the requirements of and at the current stumpage rates applicable to the sale of similar timber by the agency of the United States having jurisdiction over said lands; and all slash and debris resulting from the cutting or destruction of such timber shall be disposed of as the officer of such agency may direct.

Article 14. The Licensee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the agency of the United States concerned, to prevent, make advanced preparations for suppression, and suppress fires on lands occupied under the license.

Article 15. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete and maintain such navigation facilities.

Article 16. The Licensee shall furnish free of cost to the United States power for the operation and maintenance of navigation facilities at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

Article 17. The operation of any navigation facilities, which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the construction, maintenance, and operation by the Licensee, at its own expense, of such lights and signals as may be directed by the Secretary of the Army.

Article 18. The United States specifically

retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

Article 19. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire supression from any stream, conduit or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or

to the use by said parties of water for sanitary and domestic purposes from any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 20. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 21. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across the project lands, conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other means of transportation and communication not inconsistent with the enjoyment of said lands by the Licensee for the purposes stated in the license. This article shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 22. There is reserved to the appropriate department or agency of the United States, or of the State or county involved, the right to take over, maintain, and supervise the use of any project road as a public road after construction of the project works is completed.

Article 23. The actual legitimate original cost of the original project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Act and the Commission's rules and regulations thereunder.

Article 24. After the first twenty (20) years of operation of the project under the license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves, pursuant to Section 10 (d) of the Act; one-half of the project surplus earnings, if any, accumulated after the first twenty years of operation under the license, in excess of six (6) percent per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year, provided that, if and to the extent that there is a deficiency of project earnings below six (6) percent per annum for any fiscal year or years after the first twenty years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated

thereafter until absorbed, one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained therein until further order of the Commission. This Article is effective through August 18, 1976.

Article 25. No lease of the project or part thereof whereby the lessee is granted the exclusive occupancy, possession, or use of project works for purposes of generating, transmitting, or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of the license, of the Act, and of the rules and regulations of the Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee: Provided, that the provisions of this article shall not apply to parts of the project or project works which may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the

project or project works, the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for such purposes.

Article 26. The Licensee, its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties necessary or useful to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of, without the approval of the Commission: Provided, that a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. In the event the project is taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the licensee, its successors and assigns will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for payment and discharge, of all liens or incumbrances upon the

project or project property created by the Licensee or created or incurred after the issuance of the license: Provided, that the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to or right of user in any of such project property than was necessary to acquire for its own purposes as Licensee.

Article 27. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

Article 28. The Licensee shall pay to the United States the following annual charges:

(i) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, one (1) cent per horsepower on the authorized installed capacity (460,000 horsepower) plus two and one-half (2 1/2) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made.

(ii) For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands, $320.50.

Article 29. The Licensee shall submit for Commission approval, Exhibits F and K prepared in accordance with the Commission's rules and regulations, showing and describing the project boundary and project lands for the reconstructed Weiss, Lock 3, Kelly Creek and Wetumpka Developments and for the reconstructed Lay Development within one year following the completion of construction of each separate development.

Article 30. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings for the Lock 3, Kelly Creek and Wetumpka developments showing the design of the project structures for these developments; and the Licensee shall not begin construction of these developments until the Commission has received the approval by the Chief of Engineers and the Secretary of the Army of the plans of structures affecting navigation and has received the recommendations of the Chief of Engineers and the Secretary of the Army as to plans of structures affecting flood control, and until the Commission has approved such Exhibit L drawings.

Article 31. The Commission reserves the right to determine at a later date what

transmission facilities, if any, shall be included in the license as part of the project works.

Article 32. Licensee shall, prior to impounding water in the reservoirs, dispose of all temporary structures, unused timber, brush, refuse, or flammable material resulting from the clearing of the land or from the construction and maintenance of the project works; and shall clear all lands in the reservoir areas up to the normal elevations of the power pools, except lands which are planned to be left uncleared in the interest of attaining the full recreational potential and the full fish and wildlife conservation potential - in the Lock 3 and Jordan No. 2 developments and in the enlarged reservoir portion of the Lay redevelopment, as will be shown in a plan to be developed cooperatively by the Licensee and the State Department of Conservation and the State Department of Public Health of Alabama after consultation with the United States Fish and Wildlife Service and the District Engineer, U. S. Army Engineer District, Mobile, Alabama, provided that the plan agreed to will be filed for Commission approval and provided further, that in the event agreement cannot be reached in the formulation of such a plan for selection of areas to be left uncleared, the Commission reserved the right to make such determination after notice and opportunity for hearing. The clearing of the land and disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 33. Subject to the provision of Section 13 of the Act and Sections 8 and 12 of Public Law 436, the Licensee shall commence construction of each of the following developments, shall thereafter in good faith and with due diligence prosecute the construction, and shall complete each development, not later than the following respective dates:

Development	Commence Construction	Complete Construction with Initial Installation Specified in Finding (2) of this License
Weiss	Within 2 years from Sept. 4, 1957	Within 5 years from September 4, 1957
Kelly Creek	Within 3 years from Sept. 4, 1957	Within 7 years from the date of commencement of construction of Weiss dam
Lock 3	Within 5 from Sept. 4, 1957	Within 8 years from the date of commencement of construction of Weiss dam

Wetumpka -	Within 6 from Sept. 4, 1957	Within 9 years from the date of commencement of construction of Weiss dam
Lay	Within 7 from Sept. 4, 1957	Within 10 years from the date of commencement of construction of Weiss dam

Article 34. The Licensee shall at such times as the Commission may direct and to the extent that it is economically feasible to do so, and after notice and opportunity for hearing, install additional generating capacity in the Weiss, Lock 3, Kelly Creek and Lay developments.

Article 35. The actual legitimate original cost, estimated where not known, and the accrued depreciation of the parts of the Lay Development completed prior to the effective date of the license shall be determined by the Commission as of such effective date, in accordance with the Act, and the rules and regulations of the Commission, and such cost less such accrued depreciation, so determined, shall be the net investment in the project as of such effective date.

Article 36. The actual legitimate, original cost of the parts of the project to be completed

after the effective date of the license, and of any addition to or betterment of the project, shall be determined by the Commission in accordance with the Act and the rules and regulations of the Commission thereunder.

Article 37. The Licensee shall cooperate with the Alabama Department of Conservation, the Georgia Game and Fish Commission, and the U. S. Fish and Wildlife Service during the period of final planning, project construction, and operation of the proposed and existing units of the project, and comply with such reasonable modifications of the project structures and such reasonable modifications of project operations in the interest of fish and wildlife resources, provided that such modifications shall be reasonably consistent with the primary purpose of the project and not unduly impair the power value of the project, as may hereafter be prescribed by the Commission upon the recommendations of the Alabama Department of Conversation, the Georgia Game and Fish Commission and the Secretary of the Interior after notice and an opportunity for hearing and upon a finding based on substantial evidence that such modifications are necessary and desirable, and consistent with the provisions of the Federal Power Act: Provided, however, that no modifications of the project structures shall be required unless recommendations are made by the aforementioned agencies six months prior to the date of commencement of construction of each project structure, as specified in this

license.

Article 38. The Licensee shall acquire by flowage easements, or by fee title, the right to flood the lands above and below each dam deemed necessary to permit realization of the prescribed flood control regulation plans and shall hold the Government free and clear against any damage claims due to the operation by the Licensee, during the term of the license or of any extension or renewal thereof, of the project for flood control under regulations to be prescribed by the Secretary of the Army.

Article 39. Nothing in this license shall be deemed to affect the right of the United States to construct a dam on the Alabama River at or near Jones Bluff, and to operate it with a normal pool not to exceed elevation 125 feet m.s.l. at the dam for navigation, flood control, power development, and other purposes without compensating the Licensee, its successors or assigns. To the extent that it may be mutually agreed between the Licensee and the Chief of Engineers, U.S. Army, or his designated representative, operation of the Wetumpka project shall be coordinated with the operation of the proposed Jones Bluff dam to obtain optimum utilization of the water resources involved: Provided, That in the event the Licensee and Chief of Engineers fail to reach an agreement as contemplated herein, the Commission may, after notice and opportunity for hearing, determine this matter.

Article 40. The operation of the dams constituting the project in the interest of flood control, including the control of the level of the pool caused by each of the dams, and the discharge of water through the spillways or any outlet structures of such dams, shall be in accordance with such reasonable rules and regulations as may be prescribed by the Secretary of the Army.

Article 41. The Licensee shall make available on a seasonal basis as shown on the rule curve designated as Exhibit H, Fig. 2A, in the application for amendment of license filed September 16, 1960 (which exhibit is incorporated as a part of this license), the storage between elevations 460 and 465 feet in the Logan Martin Reservoir (formerly designated as Kelly Creek Reservoir) for flood control use. For regulating floods comparable to those of record (1929 to 1950), storage will be utilized for induced surcharge operations up to elevation 474.6 feet, and to higher elevations as required to compensate for lost valley storage during greater floods, with the details of operation specified by rules and regulations prescribed by the Secretary of the Army, from time to time.

Article 42. The Commission reserves the right to determine at a later date what lands of the United States are affected by the project and the amount of annual charges to be fixed for the use thereof.

Article 43. The Licensee shall at all times comply with the requirements of the Alabama State Board of Health, the Georgia State Board of Health, and the United States Public Health Service for the protection of the public health through the control of mosquito production within the project area of the separate developments.

Article 44. The Licensee shall submit for Commission approval Exhibit H for the complete Lay development (constructed and unconstructed parts) within one year from the date of issuance of the license.

Article 45. The Licensee shall install the third generating unit in the Weiss Development and complete the installation not later than September 4, 1963.

Article 46. The Licensee shall cooperate with the District Engineer, Corps of Engineers, Mobile, Alabama, and coordinate its plans for the Jordan No. 2 Development with those of the Corps in the interest of navigation for the lower Coosa River and shall not initiate construction of the Jordan No. 2 Development until the plans have been submitted and approved pursuant to Article 30 of this license.

Article 47. The Licensee shall cooperate with the Alabama Museum of Natural History in arranging for any archaeological salvage made necessary by the proposed Jordan No. 2

Development.

Article 48. The Licensee shall cooperate with the Alabama Division of State Parks, Monuments, and Historical Sites to determine means of protecting and enhancing the recreational values that may be affected or created by the proposed Jordan No. 2 Development.

Article 49. All water available in Jordan No. 1 Lake under license in Project No. 618 shall be used through Jordan No. 2 development of Project No. 2146 up to its hydraulic capacity except water sufficient to provide the minimum flow below Jordan No. 1 dam required under Article 34 of the license in Project No. 618 and except that water may be utilized through the existing Jordan No. 1 development in amounts sufficient for full output therein not to exceed four hours per week-day during the four maximum peak months of each year, provided, however, that the limitations herein on the operations of Jordan No. 1 development shall not prohibit the utilization of water through Jordan No. 1 development at any time such operation is required to prevent the wastage of water over the Jordan No. 1 spillway.

Article 50. The maximum normal water surface elevations for the Lock 3 development shall be at 505 feet from November 5 through April 15, and at 508 feet from May 1 through October31 of each year, and the temporary

lowering of the water surface elevation below these maximum normal water surface elevations, in the interest of flood control and navigation, shall be in accordance with such reasonable rules and regulations as may be prescribed by the Secretary of the Army.

Article 51. The Licensee shall, within six months after the issuance of this order, submit to the Commission for approval, a proposed recreational use plan for the project. The plan shall be prepared after consultation with appropriate Federal, State, and local agencies and shall include recreational improvements which may be provided by others in addition to the improvements the Licensee plans to provide.

Article 52. Pursuant to Section 10(d) of the Act, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One half of the project surplus earnings, if any, accumulated after the first 20 years of operation under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year: Provided, that, if and to the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal

year or years after the first 20 years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the weighted cost components of long-term debt, preferred stock, and the cost of common equity, as defined herein. The weighted cost component for each element of the reasonable rate of return is the product of its capital ratios and cost rate. The current capital ratios for each of the above elements of the rate of return shall be calculated annually based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10 year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 53. The Licensee shall commence reconstruction of project works within 6 months from the issuance date of this amendment and shall thereafter in good faith and with due diligence prosecute and complete such reconstruction within two and one-half years after the effective date of this amendment.

Article 54. Before commencement of reconstruction, the Licensee shall submit for approval by the Chief, Bureau of Power one copy each of the final contract bid specifications and drawings and a quality assurance plan for the reconstruction work.

Article 55. The Licensee shall retain a board of three or more qualified independent consultants to review the design, specifications, and construction of the project for safety and adequacy. The names and qualifications of the proposed board members shall be submitted to the Chief, Bureau of Power for approval. Among other things, the Board shall assess the geology of the project site and surroundings; the proposed design, specifications, and construction of the dam, powerhouse, electrical and mechanical equipment involved in water control, and emergency power supply; the construction inspection program; construction procedures and progress, instrumentation, and plans for surveillance during initial filling of the reservoir. The Licensee shall submit copies of the board's report on each meeting. The Licensee shall also submit a final report of the board upon

completion of the project. The final report shall be filed with the Commission within 60 days after initial reservoir filling and shall include, inter alia, a statement indicating the Board's satisfaction with the construction, safety, and adequacy of the project structure.

Article 56. The Licensee shall install appropriate instrumentation and other devices to monitor seepage, uplift, and performance of the project structures and reservoir slopes. A plan for initial filling of the reservoir, a plan of instrumentation, and a schedule of recording instrument readings shall be furnished to the Commission prior to initial filling of the reservoir. The Licensee shall furnish periodically to the Commission, as may be requested by the Commission or its Atlanta Regional Engineer, a report and analysis of the instrument readings.

Article 57. The Licensee shall in the reconstruction of the Walter Bouldin development, revegetate borrow and spill areas in the earliest practical time after the completion of work at each area.

Article 58. The Licensee shall, in the reconstruction of the Walter Bouldin development, consult with the Alabama State Historic Preservation Officer prior to the use of new borrow or spoil areas, including any outside the project boundary, to determine the extent of any archeological survey and salvage excavations

that may be necessary, and provide funds in a reasonable amount for any needed surveys or salvage excavations to be conducted and completed prior to the commencement of such work.

Article 59. In the construction, maintenance or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams and other waters, stream sedimentation, and any other form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds necessary for these purposes, after notice and opportunity for hearing: provided, that the Licensee shall conduct, in cooperation with the Alabama Department of Natural Resources and Conservation, a study of erosion along the tailrace canal of the Walter Bouldin development to determine 1) the causes thereof; 2) the specific effects of this erosion on water quality and fishery resources; 3) what measures could be taken to eliminate or reduce this erosion or mitigate the effects thereof; and 4) the benefits of erosion control weighed against the costs thereof. The study shall begin concurrently with operation of the Bouldin development and end three years thereafter. The results of the study shall be submitted to the Commission for its information within 6 months of its completion.

Article 60. The Licensee shall file with the Commission and shall implement, and modify when appropriate, an emergency action plan designed to provide an early warning to upstream and/or downstream inhabitants and property owners if there should be an accident to, or failure of, project structures. Such plan, to be submitted within one year of the date of issuance of this order, shall include but not be limited to, instructions to be provided on a continuing basis to operators and attendants for actions they are to take in the event of an emergency; detailed and documented plans for notifying law enforcement agents, appropriate Federal, State and local agencies, operators of water-related facilities, and those residents and owners of properties that could be endangered; actions that would be taken to reduce the inflow to the reservoir, if such is possible, by limiting the outflow from upstream dams or control structures; and actions to reduce downstream flows by controlling the outflow from dams located on tributaries to the stream on which the project is located. The Licensee shall also submit a summary of the study used as a basis for determining the areas that may be affected by such emergency occurrence, including criteria and assumptions used. Licensee shall monitor any changes in upstream or downstream conditions which may influence possible flows or affect areas susceptible to damage, and shall promptly make and file with the Commission appropriate changes in such emergency action plan.

Article 61. The Licensee, in consultation with the Heritage Conservation and Recreation Service of the Department of the Interior, the Alabama Division of Parks, the Georgia Division of Parks and Historic Sites, and other appropriate Federal, State and local agencies, shall (a) conduct a study to determine whether additional recreational facilities are needed at the Walter Bouldin Development, and (b) assess the need to develop project lands and waters, not previously dedicated to public recreation, to meet future recreational demands. Within one year from the date of issuance of this order, Licensee shall file with the Commission a report on the results of the study and, if the results indicate that additional recreational facilities are needed at the project, file for approval an amendment to the Exhibit R describing the facilities to be provided.

Article 62. Licensee shall, within one year from the date of issuance of this Order, file with the Commission for approval a construction schedule for those recreational facilities proposed in the approved Exhibit R, indicating by type and number of facilities the time frame in which development will be completed. Construction schedules shall also be provided for any facilities determined necessary by the study required by Article 61.

Article 63. Licensee shall, in consultation and cooperation with appropriate Federal, State and local agencies, conduct a

study to determine the feasibility o, and the need for providing tailrace fishing facilities below Walter Bouldin Dam. The study shall be completed within one year from the date of completion of the erosion study required by Article 59 of this license. The Licensee shall, upon completion of the feasibility study, file with the Commission a report on the results of the study and, if the results of the study determine that tailrace fishing facilities are feasible and needed, file for approval an amendment to the Exhibit R to include Licensee's plan to develop and maintain the necessary facilities.

Article 64. (a) In accordance with the provisions of this Article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and water for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with covenants of the instrument of conveyance for, any interest that it has conveyed, under this article. If a permitted use

and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, the action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape or plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable State and local health and safety requirements. Before granting

permission for construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines and procedures for implementing this paragraph (b) and to require modifications of those standards, guidelines or procedures.

(c) The Licensee may convey easements or rights of way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or

underground major telephone distribution cables or major electric distribution lines (69-kv or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easement or rights of way across, or leases of project lands for (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into the project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate nor more than 10 watercraft at a time and are located at lease one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an

Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Officer of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) and (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed to not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of a structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article doe not in itself change the project boundaries. The project

boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawing (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 65. Prior to the commencement of any construction or development of any project works, or other facilities at the project, the Licensee shall consult and cooperate with the appropriate State Historic Preservation Officer (SHPO) to determine the need for, and extent of any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the

SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historical work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

ALABAMA POWER COMPANY,
a corporation

Plaintiff

CIVIL ACTION
No. 1287

vs.

6,100 acres, more or less, of land in St. Clair, Calhoun, and Talladega Counties, Alabama, and Everette Poe, et al

Filed in Clerk's Office Northern District of Alabama August 19, 1965 Francis

Defendants

FINAL ORDER AND DECREE DISTRIBUTING IN FULL ALL FUNDS WITH REGARD TO TRACT #184

This cause coming on to be heard, and being submitted for final decree upon the pleadings and petition filed this day by H. B. Powell and Roberta Powell, through their attorney, and the same being understood by the Court, it is ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff herein acquire fee simple title to 214.3 acres, more or less, in Tract #184, such acreage lying below an elevation of 465 feet above mean sea level, and that plaintiff herein acquired the right to flood 40.5 additional acres, more or less, of Tract #184 from time to time, such acreage lying between the elevation of 465 feet above mean sea level and the elevation of 473.5 feet above mean sea level.

2. That just compensation to be paid to the owners of Tract #184 for the taking of such rights, title and interests, and for damage to the remaining lands, designated in paragraph 1 above, is $31,328.00, and that such sum constitutes the only amount and the only sum to be received by the owners of Tract #184.

3. That the parties in interest in Tract #184, and the only persons entitled to share in the sum of $31,328.00 heretofore deposed by plaintiff in this cause, are the persons named in paragraph 4 hereof. Such sum of $31,328.00 is hereby decreed to be the full, just and adequate compensation.

4. The parties in interest as to Tract #184 are H. B. Powell and Roberta Powell, represented by Mr. Maurice F. Bishop. Petitioners have heretofore withdrawn the sum of $28,480.00 in this cause. The Clerk of the Court is hereby directed to draw a check in the sum of $2,848.00 payable to H. B. Powell,

Roberta Powell, and Maurice F. Bishop, Attorney, and mail such check to Mr. Maurice F. Bishop, Attorney at Law, Frank Nelson Building, Birmingham, Alabama. The costs in this proceeding are taxed against the Plaintiff.

This August 19, 1965.

/s/ H. H. Graves

United States District Judge

Supreme Court, U. S.
FILED
DEC 7 1998
CLERK

No. 98-733

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHNNY POWELL and HUGH POWELL,

Petitioners,

vs.

ALABAMA POWER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN F. CASEY
Counsel of Record
R. BRUCE BARZE, JR.
SPENCER M. TAYLOR
BALCH & BINGHAM LLP
Attorneys for Respondent
1710 Sixth Avenue North
Birmingham, Alabama 35203
(205) 251-8100

150056

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the trial court properly found that Alabama Power Company's protection of its flood easement, a private property right, does not constitute the federal action necessary to support the Petitioners' Counterclaim.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

The Southern Company is the parent company of respondent Alabama Power Company. Southern Electric Generating Company is a nonwholly owned subsidiary of respondent Alabama Power Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding and Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. The petition omits pertinent facts.	1
B. The petition mischaracterizes the issue in this case.	4
Reasons for Denying the Writ	5
I. Review Is Not Warranted Because Apco's Protection Of Its Flood Easement, A Private Property Right, Does Not Constitute The Federal Action Necessary To Support The Petitioner's Constitutional And 42 U.S.C. § 1983 Claims.	5
A. APCo is merely enforcing a private property right.	6
B. The Petitioners cannot demonstrate federal action under any test.	8

Contents

Page

1. APCo is not performing an activity traditionally exclusively reserved to the federal government. 10

2. There is no nexus or joint participation between APCo's protection of its flood easement and the federal government. 14

3. Petitioners offer no authority to support their position. 18

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Alabama Power Co. v. Smith, 575 So. 2d 1084 (Ala. 1991) 8

Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980) 8, 17

Blum v. Yaretsky, 457 U.S. 991 (1982) 7, 11

Brown v. Alabama Power Company, 156 So. 2d 153 (Ala. 1963) 6

Carlin Communication v. Southern Bell, 802 F.2d 1352 (11th Cir. 1986) 6, 7, 16, 17

Cobb v. Georgia Power Company, 757 F.2d 1248 (11th Cir. 1985) 17

Cook v. Advertiser Company, Inc., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972) 17

Feldman v. Jackson Memorial Hospital, 509 F. Supp. 815 (S.D. Fla. 1981) 14

Green and B. R. Navigation Co. v. Chesapeake, O and S.W.R. Co., 10 S.W. 6 (Ky. Ct. App. 1888) 18

Groman v. Township of Manalapan, 47 F.3d 628 (3rd Cir. 1995) 13, 14

Cited Authorities

Page

Hansen v. Salt Lake County, 794 P.2d 838 (Utah 1990) 18, 19

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 8, 9, 10, 11, 12, 14, 15, 16, 18, 20

Kearson v. Southern Bell Telephone & Telegraph Co., 763 F.2d 405 (11th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) 8, 17, 18

Kimbrough v. Nat'l Railroad Passenger Corp., 549 F. Supp. 169 (M.D. Ala. 1982) 8, 17

Mark v. Borough of Hatboro, 856 F. Supp. 966 (E.D. Pa. 1994) 13

Moore v. Liberty Nat. Life Ins. Co., 581 So. 2d 833 (Ala. 1991) 3

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 16

Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) .. 8, 9, 14, 15

Newton v. Southeast Alabama Gas District, 708 F. Supp. 1254 (M.D. Ala. 1989) 19, 20

Pennsylvania Water & Power Co. v. Federal Power Commission, 123 F.2d 155 (D.C. Cir. 1941) 18, 19, 20

Cited Authorities

Page

Shell Oil Co. v. Board of Commissioners of Pontchartrain Levee District, 336 So. 2d 248 (La. Ct. App. 1976) 18, 19

State of Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941) 19, 20

System Dynamics International, Inc. v. Boykin, 683 So. 2d 419 (Ala. 1996) 7

United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995) 12, 13, 20

United States v. Grand River Dam Authority, 363 U.S. 229 (1960) 19, 20

United States of America v. Twin City Power Co., 350 U.S. 222 (1956) 19

Statutes:

42 U.S.C. § 1983 ..... 5, 18

PA. STAT. ANN., Tit. 66, § 1171 (West 1959) 10, 11

United States Constitution:

Fifth Amendment 1, 2, 5

First Amendment 17

Fourteenth Amendment 8, 11

Cited Authorities

Page

Rules:

Alabama Rule of Civil Procedure 12(b)(6) 3

Alabama Rule of Civil Procedure 56(c) 3

STATEMENT OF THE CASE

Respondent Alabama Power Company (hereinafter "APCo") agrees with the procedural history of this case set forth in the petition filed by Hugh and Johnny Powell (hereinafter "Petitioners"). However, the Petitioners' statement of the case omits pertinent facts that were before the trial court and mischaracterizes the issue presented. APCo will supplement and correct the Petitioner's statement below, as well as address the question presented by Petitioners: that is, their contention that APCo is a federal actor for the purpose of a Fifth Amendment discrimination claim.

As detailed below, there is no cause for this Court's review of this fact bound contention, which now has been rejected by the trial court and by the Supreme Court of Alabama on two, separate occasions. Substituting hyperbole about APCo "discriminat[ing] with impunity on the grounds of race, religion, friendship, or for other equally trivial reason" (Pet. 6) for an accurate description of the facts and issue at hand, the Petitioners have distorted the question presented in this case.

A. The petition omits pertinent facts.

In furtherance of their assertion that this case concerns only flood control by a federal actor, Petitioners omit facts about the true nature of this trespass case, filed by one landowner, APCo, to prevent its neighboring landowners, the Petitioners, from placing dirt and fill materials on APCo's property.

On August 19, 1965 APCo acquired a fee simple interest in certain real property (214.3 acres, more or less) located in St. Clair County, Alabama, which presently comprises a portion of the land under the Logan Martin Dam Reservoir (the "Reservoir"). App. 3d, 2h.[1] APCo also acquired an easement

1. Citations to "App. __" refer to the appendix submitted by the Petitioners.

granting the right to flood 40.5 additional acres, more or less, of property belonging to the Petitioners, lying between the elevation of 465 feet above mean sea level and the elevation of 473.5 feet above mean sea level (the "flood easement"). App. 2h. The Petitioners' predecessors in interest received $31,328 as compensation for the 214.3 acres and the flood easement. App. 2h.

APCo filed this common law trespass action on April 20, 1995 in the Circuit Court of St. Clair County, Alabama, seeking to enjoin the Petitioners from placing dirt and fill materials between the Petitioners' Property and an island within the boundaries of the Reservoir. R. 11-20. By placing these materials in the Reservoir (where APCo owns the land in fee simple) and in the flood easement, the Petitioners have constructed a dirt road from their property to the island, and APCo seeks an order requiring the Petitioners to cease this activity and to remove all of the fill materials. R. 11-20. The trial court issued a preliminary injunction by consent of the parties prohibiting the Petitioners from placing further fill materials in the flood easement during the pendency of these proceedings. R. 32-33.

On November 18, 1996 the Petitioners filed a Counterclaim alleging that APCo, while acting under color of law, violated their Fifth Amendment due process and equal protection rights by arbitrarily and capriciously enforcing its rights related to the flood easement. R. 52-53. The Petitioners' allegations purportedly were based on the fact that APCo initiated this lawsuit against them, but had not pursued the same remedies against other similarly-situated property owners.[2] R. 52-53, 129-

2. It is noteworthy that the Petitioners have failed to cite ***any*** specific example of discrimination demonstrating arbitrary or capricious application of APCo's easement rights, nor have they identified in the (Cont'd)

31. The Petitioners amended their Counterclaim on March 31, 1997, asserting substantially the same challenges. App. 1e.

On December 18, 1996 APCo moved to dismiss the Petitioners' Counterclaim on the ground that it failed to demonstrate the necessary element of federal action by APCo. R. 56-63. After extensive briefing by the parties and submission of evidence, the trial court dismissed Petitioners' Counterclaim on May 13, 1997, finding that APCo's protection of its flood easement did not amount to federal action.[3] App. 1a-3a. The trial court held,

> Defendants have offered no authority to support [a finding of federal action]; in fact, the authority submitted to this Court by all parties establishes that APCo's activities are private, as opposed to actions of the FERC or federal government.

App. 2a.[4]

(Cont'd)
record any "similarly situated" property owners who have been treated differently. These unsupported allegations merely serve to highlight the Counterclaim's overall lack of merit.

3. APCo's claims in this lawsuit, which was filed on April 20, 1995, have been stayed pending the outcome of this appeal.

4. Because the trial court considered matters outside the pleadings, APCo's motion to dismiss was converted to a motion for summary judgment, in accordance with Alabama Rule of Civil Procedure 56(c). *Moore v. Liberty Nat. Life Ins. Co.*, 581 So. 2d 833, 834 (Ala. 1991). In addition, the trial court's order states that the Counterclaim is "due to be dismissed, with prejudice, pursuant to Rules 12(b)(6) ***and 56 of the Alabama Rules of Civil Procedure***. . . ." App. 2a (emphasis added). The order, thus, flatly contradicts Petitioners' premise that the appropriate standard of review is a Rule 12(b)(6) "motion to dismiss" standard. Pet. 8.

On May 30, 1997 the Petitioners filed a notice of appeal to the Supreme Court of Alabama. R. 198-203. The Supreme Court of Alabama affirmed the trial court's decision without opinion on April 17, 1998, and it denied the Petitioners' Application for Rehearing on June 19, 1998. App. 1b and 1c.

B. The petition mischaracterizes the issue in this case.

Contrary to Petitioners' assertions, the issue before the trial court was whether APCo became a federal actor by virtue of (1) the protection of its flood easement, and (2) its filing of a civil trespass action to require the Petitioners to remove dirt and fill materials placed by them in the flood easement and Reservoir and to prohibit the future placement of such fill materials. Petitioners mischaracterize this issue as one of "flood control," and assert that flood control is an activity that is traditionally and exclusively reserved to the federal government. This assertion not only is incorrect, but it mischaracterizes Petitioners' Counterclaim and the trial court's order of dismissal — an order which was affirmed by the Supreme Court of Alabama.

APCo maintains a flood easement, as required by its Federal Energy Regulatory Commission (hereinafter "FERC") license, in order to operate the Reservoir and generate electric power, and this operation admittedly involves some elements of shoreline regulation and flood control. R. 141-42. However, the Petitioners' Counterclaim did ***not*** challenge APCo's operation of the Reservoir or APCo's right to flood portions of the Petitioners' property. Nor did the Counterclaim complain about placement by APCo of structures on their property or the denial of a shoreline construction permit. The only activity challenged by the Counterclaim is APCo's decision, as a private land owner, to enforce its property rights. However, APCo's vigilance with respect to its property rights does not equate to action by the federal government.

REASONS FOR DENYING THE WRIT

I.

REVIEW IS NOT WARRANTED BECAUSE APCO'S PROTECTION OF ITS FLOOD EASEMENT, A PRIVATE PROPERTY RIGHT, DOES NOT CONSTITUTE THE FEDERAL ACTION NECESSARY TO SUPPORT THE PETITIONER'S CONSTITUTIONAL AND 42 U.S.C. § 1983 CLAIMS.

The petition's fact bound claim that the courts below committed error in determining that Petitioners' Counterclaim was due to be dismissed does not warrant review by this Court. Review by this Court is not appropriate when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. In any event, however, the decision below was a plainly correct application of settled law.

The Petitioners contend that this case is worthy of United States Supreme Court review because, according to the petition, the trial court and the Supreme Court of Alabama (1) made an erroneous factual finding — that APCo is a private actor; and (2) misinterpreted the applicability of the Fifth Amendment to APCo, which allegedly has discriminated against Petitioners "in the regulation of easements acquired pursuant to a federal license to control flooding on navigable waters." Pet. 6. Further, Petitioners state that "APCo asserts that because it is a private entity it may discriminate with impunity on the grounds of race, religion, friendship, or for other equally trivial reason" and that

> [t]his argument was adopted by the trial court and on appeal, by the Supreme Court of Alabama ***based on an erroneous interpretation*** of this Court's

> ruling in *Jackson v. Metropolitan Edison*, [419 U.S. 345 (1974)].

Pet. 6 (emphasis added). Because the petition is based solely on Petitioners' assertions of erroneous factual findings and misapplications of settled law, the petition is due to be denied. Moreover, Petitioners' argument misstates APCo's position set forth in its motion to dismiss the Counterclaim, and it misrepresents the trial court's order dismissing their claims.

A. APCo is merely enforcing a private property right.

Contrary to the Petitioners' assertions, APCo's position, with which the trial court and the Supreme Court of Alabama agreed, was that APCo was ***not*** acting as the federal government when it filed a civil trespass action to protect its property rights; rather, it simply was exercising the right, enjoyed by any private citizen, to bring a cause of action to enforce an easement. *See, e.g., Brown v. Alabama Power Company*, 156 So. 2d 153, 155 (Ala. 1963) ("The owner of the servient estate must abstain from acts interfering with the proper enjoyment of the easement by the owner of the dominant estate."). The Petitioners' characterization of the challenged activity as flood control rather than the protection of APCo's property right is entitled to no consideration under law.

Decisions of this Court "have made it clear that in order to establish state action the plaintiff must show that the state is responsible for the ***specific conduct*** of which he complains." *See Carlin Communication v. Southern Bell*, 802 F.2d 1352, 1357 (11th Cir. 1986) (emphasis added).

> Faithful adherence to the state action requirement of the Fourteenth Amendment requires careful

> attention to the gravamen of the [Petitioners'] complaint.

Id. (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982)). The gravamen of the Petitioners' Counterclaim clearly is ***not*** that APCo provides more flood protection to similarly-situated property owners than it does to the Petitioners, or that it has discriminated against the Petitioners on the basis of "race, religion, friendship, or for other equally trivial reason." Rather, the only basis for the Petitioners' Counterclaim appears to be that APCo, by the mere act of attempting to enforce its private property rights, was acting as the federal government. The trial court, and Alabama's highest court, found correctly that the Petitioners offered no authority to support this position:

> It is the opinion of this Court that APCo's operation of its reservoir for the generation of power, which necessarily includes elements of shoreline regulation and flood control, does not amount to state action, necessary to support [Petitioners'] Counterclaim and Amended Counterclaim against APCo. Because [Petitioners] fail to show that APCo's operation of its reservoir is state action under any test, [Petitioners'] Counterclaim and Amended Counterclaim are due to be dismissed.

App. 3a. The trial court determined, after reviewing evidence and the parties' legal arguments, that "the authority submitted . . . by all parties establishes that APCo's activities are private, as opposed to actions of the FERC or the federal government." The trial court, following applicable precedent, determined that there was no genuine issue as to any material fact and that APCo was entitled to judgment as a matter of law. *See System Dynamics International, Inc. v. Boykin*, 683 So. 2d 419, 420 (Ala. 1996). All precedent from this Court and state and federal

courts is clear: dismissal of constitutional claims against a private power company is proper when the complainant fails to show that the activities of the utility are attributable to the government itself. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (affirming dismissal of plaintiff's Fourteenth Amendment complaint against a privately-owned power company because there was no state action); *Kearson v. Southern Bell Telephone & Telegraph Co.*, 763 F.2d 405 (11th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) (affirming dismissal of plaintiff's complaint against utility for lack of state action); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980) (affirming dismissal of plaintiff's complaint against utility for lack of state action); *Kimbrough v. Nat'l Railroad Passenger Corp.*, 549 F. Supp. 169 (M.D. Ala. 1982) (granting Amtrak's motion to dismiss for lack of state action); *Alabama Power Co. v. Smith*, 575 So. 2d 1084 (Ala. 1991) (directing verdict for APCo on the basis that there was no state action when APCo discontinued electrical service in accordance with public service commission authorization when power meter measurements were questionable). Because the Petitioners failed to show that APCo, a private actor, was acting as the federal government in seeking to protect its flood easement, the courts below properly applied existing law and dismissed the Petitioners' Counterclaim.

B. The Petitioners cannot demonstrate federal action under any test.

The trial court correctly applied three tests in evaluating whether federal action was present: (1) the symbiotic relationship test; (2) the public function test; and (3) the nexus test. *Morast v. Lance*, 807 F.2d 926, 931 (11th Cir. 1987) (holding that national bank did not act under color of federal law in terminating employee). Under the symbiotic relationship test,

> the court must consider whether the government "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity."[5]

Id. Under the public function test, government action is present where the government has delegated to a private party a power "traditionally exclusively reserved" to the state or federal government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). Finally, for government action to exist under the nexus test, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State." *Jackson*, 419 U.S. at 351 (holding there was an insufficient relationship between the state and the utility to conclude that the utility acted for the state). Under any test, the

> State normally can be held responsible for private decisions ***only*** when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.

Morast, 807 F.2d at 931 (emphasis added). In granting APCo's Motion to Dismiss, the trial court held that the Petitioners were unable to establish federal action under any test. App. 3a.

---

5. The Petitioners have never argued that the symbiotic relationship test has been met.

1. *APCo is not performing an activity traditionally exclusively reserved to the federal government.*

Failing to cite a single example, the Petitioners baldly assert that APCo has arbitrarily and capriciously applied rules and regulations relating to the easement. The "rules and regulations" to which the Petitioners refer apparently relate to APCo's treatment of similarly-situated property owners, yet the record is devoid of ***any*** evidence that other property owners are placing dredge and fill materials in APCo's easement or the Reservoir. Because this case concerns enforcement of private property rights, whether flood control is an activity traditionally reserved exclusively to the federal government is irrelevant — flood control simply is not the issue in this case. However, under any characterization, all precedent clearly establishes that Petitioners have failed to demonstrate that APCo has undertaken ***any*** activity traditionally reserved to the federal government.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), this Court dismissed a plaintiff's complaint against a defendant utility, holding that the utility's termination of her electric service did not constitute state action. *Jackson* held that the state action doctrine did not apply to a private power company which performed a "public function" and whose activities were "affected with the public interest." *Id.* at 353-54. The plaintiff in *Jackson* alleged that the utility's termination of her power service constituted state action, because the company was a heavily-regulated monopoly operating under state law. *Id.* at 350-52. She presented evidence that the State of Pennsylvania issued a certificate of public convenience to the heavily-regulated private power company, which subjected the defendant company to extensive regulation as a condition to holding the certificate. *Id.* at 346. Among these requirements, the Pennsylvania Code required electric service to be provided on a reasonably continuous basis. *Id.* at 352 (citing PA. STAT.

ANN., Tit. 66, § 1171 (West 1959)). She argued that because the utility provided a public service subject to this state requirement, the utility was a state actor for purposes of her Fourteenth Amendment challenge. *Id.*

This Court, however, held that the "supplying of utility service is not traditionally the exclusive prerogative of the State," and consequently, affirmed dismissal of the plaintiff's Fourteenth Amendment claims. *Jackson*, 419 U.S. at 353. While the Pennsylvania statute imposed an obligation on regulated utilities, it imposed no such obligation on the State. *Id.* In the instant case, the challenged activity is APCo's enforcement of its easement rights and an attempt to prohibit the Petitioners from disregarding APCo's property rights. Such action certainly is not an activity that is traditionally the exclusive prerogative of the federal government. Indeed, landowners for centuries have initiated such lawsuits to avoid losing their property rights by prescription. Moreover, even under the Petitioners' extraordinarily broad interpretation[6] of the challenged activity as "flood control," there is no federal action. APCo, a private actor, acquired this flood easement for the purpose of generating and supplying electricity. Taking the Petitioners' theory and interpretation of *Jackson* to its logical conclusion, the act of ***supplying*** power is not a traditionally exclusive activity of the government,[7] yet creating a reservoir to ***generate*** power would be a traditionally exclusive federal activity. Such an interpretation of *Jackson* is not only inconsistent, it makes no sense.

Perhaps even more important to the issue presented here, the Court in *Jackson* refused to expand the "traditionally

---

6. Such a broad interpretation is not permitted under *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982), which mandates "careful attention" to the gravamen of the Petitioners' Counterclaim.

7. *Jackson*, 419 U.S. at 353.

exclusively reserved activities" doctrine into a broad principle transforming all businesses affected with the public interest into government actors for all their actions. *Id.* The Court criticized such a test:

> In several of the decisions of this court wherein the expressions "affected with the public interest" and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.

Id. at 353 (citation omitted). Even if APCo serves the public interest as a by-product of attempting to enforce its flood easement, this is insufficient to treat APCo as the federal government.

Cases discussing the state action requirement under Section 1983 claims further demonstrate the narrow application of the test and highlight the Petitioners' failure to give effect to its "exclusively reserved to the state" component. For instance, in *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902 (4th Cir. 1995), the court stated:

> The functions considered to fall traditionally within the exclusive prerogative of the state comprise a very narrow category, subject to "carefully confined bounds." The Supreme Court has identified as functions "traditionally exclusively reserved to the State," only the administration of elections, the operation of a company town, eminent domain,[8] peremptory challenges in jury selection,

8. The Petitioners attempt to hang their hat on this "eminent domain" language from *Jackson*. Clearly, enforcement of an easement is distinguishable from the exercise of eminent domain. This case and

(Cont'd)

and, in at least limited circumstances, the operation of a municipal park.

> The narrowness of this category is illustrated further by the functions that the Court has held do *not* fall traditionally within the exclusive prerogative of the State. These include the ***provision of electricity and other utilities***, the operation of nursing homes, and the coordination and governance of college and amateur athletics. The Court has held that schooling for maladjusted children does not qualify as a traditional and exclusive state function. . . . It has also noted that the provision of education does not render a private school's administrators state actors, even though "[i]t is difficult to imagine a regulated activity more essential or more "clothed with the public interest" than the maintenance of schools."
>
> Together, these cases confirm that ***only those undertakings that are uniquely sovereign in character*** qualify as traditional and exclusive state functions. As the Court has observed, ***[w]hile many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State."***[9]

Id. at 907 (citations omitted) (emphasis in bold and italics added). The trial court, too, noted that the fact that APCo's

---

(Cont'd)

Petitioners' Counterclaim do not involve an attempt by APCo to acquire property by eminent domain, but instead simply concern APCo's attempt to prevent Petitioners from placing materials within its flood easement and the Reservoir.

9. *See also Mark v. Borough of Hatboro*, 856 F. Supp. 966 (E.D. Pa. 1994) (volunteer Fire Department was not state actor); *Groman v.*

(Cont'd)

operation of the Reservoir involves some elements of flood control and shoreline regulation is insufficient to establish federal action. *See, e.g., Feldman v. Jackson Memorial Hospital*, 509 F. Supp. 815 (S.D. Fla. 1981) (stating that the state must be involved in more than some activity of the offending institution; it must have been involved ***in the activity that caused the injury*** to the plaintiff).

2. *There is no nexus or joint participation between APCo's protection of its flood easement and the federal government.*

The Alabama courts found that the Petitioners similarly failed to show federal action under either the nexus or the symbiotic relationship tests. As stated above, for government action to exist under the nexus test, there must be a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state." *Jackson*, 419 U.S. at 351. Similarly, the symbiotic relationship test requires the federal government to "so far insinuate[ ] itself into a position of interdependence with [APCo] that it must be recognized as a joint participant" in APCo's protection of its flood easement. *Morast v. Lance*, 807 F.2d at 931.

In *Jackson*, the Court concluded that the State of Pennsylvania was not sufficiently connected with the utility's termination of electric service so as to make its conduct attributable to the State. *Id.* The Court affirmed dismissal based on an insufficient nexus:

(Cont'd)
Township of Manalapan, 47 F.3d 628 (3rd Cir. 1995) (public funding and service to public were insufficient to show volunteer first aid squad was performing exclusive government function which would support section 1983 liability).

> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. ***Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.***

Id. at 358 (emphasis added). The Court further stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.

Id. at 350. Thus, neither the company's monopoly status nor the state certification authorizing the company to distribute electricity equated to state action. *Id.* at 351-52. Nor was the fact that a Pennsylvania statute required electric service to be provided on a reasonably continuous basis a sufficient nexus between the federal government and the termination of the plaintiff's electric service. *Id.*

Here, there similarly is ***no*** nexus between the federal government and the challenged activity. APCo's license authorizing operation of the reservoir for the generation of power does not provide a sufficient nexus between the federal government and APCo's attempted protection of a private

property right. The "mere licensing of a private entity does not constitute state action." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Petitioners attempt to distinguish *Moose Lodge* on the grounds that "the purpose of the APCo license is not to regulate a certain activity," but instead to delegate to APCo flood control activities which Petitioners allege is a duty "traditionally reserved to the federal government." Pet. 24. The cases, however, are indistinguishable, and Petitioners' argument is flawed. First, both licenses ***are*** regulatory; the liquor license in *Moose Lodge* was issued by the State to permit and regulate the sale of liquor just as the license here was issued to permit and regulate the generation of power. Second, Petitioners' argument that the license delegates to APCo the duty of flood control is simply a reversion back to their "traditionally exclusive governmental function" argument, and it suffers from the same infirmities highlighted above. Finally, and most important, Petitioners' challenge is not related to activity performed under or pursuant to APCo's license to generate power; rather, their Counterclaim concerns only the enforcement of APCo's property rights.

Jackson likewise found that the symbiotic relationship test was not met. *Jackson*, 419 U.S. at 357-58. The Court found that because the utility was a privately-owned power company that alone was responsible for supplying power to its customers, there was no joint participation and hence no state action. *Id.* at 358. As in *Jackson*, APCo alone is responsible for enforcing its property rights and generating electricity. *See also Carlin*, 802 F.2d at 1357 (stating the "mere approval of, or acquiescence in, the initiatives of a private party is not sufficient to establish state action").

Cases decided by the United States Court of Appeals for the Eleventh Circuit have held that operations of public utilities and heavily-regulated private businesses are insufficiently

connected to the state and cannot support a constitutional claim.[10] In *Carlin*, the court held that a privately-owned telephone company's restrictions on message content in its pre-recorded "dial-it" message service was not state action. The telephone company amended its subscriber tariff with the Florida Public Service Commission ("FPSC") to prohibit sexually explicit messages. *Id.* at 1354. The plaintiff alleged a violation of its First Amendment rights, asserting that the telephone company's restrictions constituted state action because (1) the FPSC scheduled the tariff for study and public hearing, and issued an order strongly approving the tariff language; (2) the FPSC pressured the company to alter the tariff's language; (3) the FPSC officers at the hearing stated concerns over the content control of the "dial it" program; and (4) the FPSC delegated the function of public censorship to the phone company. *Id.* at 1358-61. Affirming summary judgment for the utility, the court held that the only reasonable inference in the record was that Southern Bell denied the plaintiff access to the service in its private capacity. As in the instant case, the plaintiff in *Carlin* was unable to show that the government was responsible for the specific conduct complained of by the plaintiff. *Id.* at 1357. *See also Kearson v. Southern Bell Telephone & Telegraph Co.*, 763 F.2d 405 (11th Cir. 1985),

---

10. *See, e.g., Carlin Communication v. Southern Bell Telephone and Telegraph Co.*, 802 F.2d 1352, 1357 (11th Cir. 1986) (affirming summary judgment for utility); *Cobb v. Georgia Power Company*, 757 F.2d 1248 (11th Cir. 1985) (affirming summary judgment for utility); *Kearson v. Southern Bell Telephone & Telegraph Co.*, 763 F.2d 405 (11th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) (affirming dismissal of plaintiff's complaint against utility); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th Cir. 1980) (affirming dismissal of plaintiff's complaint against utility); *Kimbrough v. Nat'l Railroad Passenger Corp.*, 549 F. Supp. 169 (M.D. Ala. 1982) (granting Amtrak's motion to dismiss); *Cook v. Advertiser Company, Inc.*, 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972) (granting newspaper company's motion to dismiss).

cert. denied, 474 U.S. 1065 (1986) (affirming dismissal of complaint on basis that privately owned telephone company's termination of service to customer for nonpayment of bills did not involve "state action" within 42 U.S.C. § 1983).

In short, consistent with *Jackson* and these cases, APCo was not acting as the federal government by seeking to enforce its private property rights, and cannot be treated as the federal government simply because it has a flood easement and is licensed to operate the Reservoir for the generation of power. Just as the utility in *Jackson* could terminate service without subjecting itself to a constitutional challenge, APCo may institute this trespass action against individuals who violate its property rights without subjecting itself to such claims.

3. *Petitioners offer no authority to support their position.*

Significantly, Petitioners offer no authority supporting a finding that APCo is acting as the federal government in this case. They have not cited a single case finding state or federal action under these facts. It is noteworthy that the trial court permitted Petitioners substantial opportunity to offer such authority — none was ever offered, and such fact was noted by the trial court. App. 2. For this reason alone, the dismissal of the Counterclaim is due to be affirmed.

The cases cited by the Petitioners in support of federal action all are offered for the proposition that flood control is traditionally an activity exclusively reserved to the federal government.[11] Unfortunately, this case and Petitioners'

---

11. Petitioners cite *Green and B. R. Navigation Co. v. Chesapeake, O and S.W.R. Co.*, 10 S.W. 6 (Ky. Ct. App. 1888); *Hansen v. Salt Lake City*, 794 P.2d 838 (Utah 1990); *Pennsylvania Water and Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941); *Shell Oil*

(Cont'd)

Counterclaim are not about flood control. Even if they concerned flood control, however, dismissal of Petitioners' Counterclaim was proper because none of the cases or statutes cited by Petitioners have anything to do with a finding of state or federal action with facts such as those presented in this case.

First, none of the cases cited by Petitioners are state action cases involving private defendants. For example, Petitioners cite *Hansen v. Salt Lake County*, 794 P.2d 838 (Utah 1990), as recognizing "flood control as state action" in connection with upholding a flood control statute. However, *Hansen* involved a challenge to a ***county government*** defending on the grounds of governmental immunity, and quite clearly did not involve a private entity. *Hansen* did not present, address, or even mention state action, but only interpreted a Utah flood control statute. Petitioners also cite *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941), which did not address the issue of federal action. Instead, that court held only that Congress could require a utility company to apply for a license to operate and maintain a hydroelectric project. Likewise, *United States of America v. Twin City Power Co.*, 350 U.S. 222 (1956), addressed only whether a utility was entitled to compensation equal to the water-power value of land taken by the federal government. Similarly, *Shell Oil Co. v. Board of Commissioners of Pontchartrain Levee District*, 336 So. 2d 248 (La. Ct. App. 1976), involved a defendant levee district that was created by an act of the Lousisana Congress, and *Newton v. Southeast Alabama Gas District*, 708 F. Supp. 1254, 1257 (M.D. Ala. 1989), found it unnecessary to address

---

(Cont'd)

Co. v. Board of Commissioners of Lake Ponchartrain Levee District, 336 So. 2d 248 (La. Ct. App. 1976); *State of Oklahoma v. Guy F. Atkinson, Co.*, 313 U.S. 508 (1941); *United States of America v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Grand River Dam Authority*, 363 U.S. 229, 333 (1960), as well as several statutes, for this proposition.

whether the Gas District's activities constituted state action because the district was a public entity. *Id.* at 1257-58.

Second, the cases cited by the Petitioners hold merely that flood control is a power within the authority of Congress pursuant to the commerce clause of the United States Constitution. However, simply because Congress has the authority to regulate flood control does not mean that flood control is an activity "exclusively reserved" to the federal government. *See Jackson*, 419 U.S. at 354 n.9 ("The range of governmental activities is broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual or entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions"); *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995) ("[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State' "). For example, *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941) and *United States v. Grand River Dam Authority* 363 U.S. 229 (1960), held only that Congress' creation of a dam and reservoir project was a lawful exercise of its commerce power. Similarly, the court in *Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941), simply held that Congress, pursuant to its commerce power, could require a utility to purchase a license to construct a hydroelectric project. While Petitioners have cited a flurry of cases, none of them supports their position.

Finally, Petitioners' Counterclaim fails due to its inability to distinguish *Jackson* from the facts of this case. On the whole, Petitioners have offered no authority supporting their claim that APCo is a federal actor for purposes of their Counterclaim. The Petition presents nothing which has not already been considered and addressed by the Alabama courts. Consequently, the Petition should be denied.

CONCLUSION

Under these circumstances, and in the absence of any conflict between the decision of the Alabama courts and any decision of this Court, the petition should be denied.

Respectfully submitted,

STEVEN F. CASEY
Counsel of Record
R. BRUCE BARZE, JR.
SPENCER M. TAYLOR
BALCH & BINGHAM LLP
Attorneys for Respondent
1710 Sixth Avenue North
Birmingham, Alabama 35203
(205) 251-8100